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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

A. B. SWINERTON, RICHARD WALBERG and HOWARD HASSARD, Doing Business as Swinerton and Walberg Company, and JAREZ BURNS & SONS, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Ap-

peals for the Ninth Circuit entered in the above-entitled case on February 17, 1953.

OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board (R. 67-75) is reported in 94 NLRB 1079. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 268-279) is reported in 202 F. (2d) 511.

JURISDICTION.

The decree of the United States Court of Appeals was entered on February 17, 1953 (R. 263). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1), and 29 U.S.C. (Supp. III), Section 160 (e).

QUESTIONS PRESENTED.

1. Whether it effectuates the policies of the National Labor Relations Act to prosecute unfair labor practice charges against employers in the building and construction industry at a time when, for over five years, employers and unions in such industry have been denied the benefits and protection of the representation provisions of the Act.

2. Whether the enforcement of an order of the National Labor Relations Board against employers

in the building and construction industry based upon unfair labor practice charges filed by the International Association of Machinists in furtherance of its jurisdictional claims constitutes a denial of due process of law in contravention of the Fifth Amendment, where for over five years employers and unions in such industry have been denied the benefits and protection of the representation provisions of the National Labor Relations Act.[1]

STATUTE INVOLVED.

The statute involved is the National Labor Relations Act, 29 U.S.C., Section 151 et seq., as amended by the Labor Management Relations Act of 1947, 29 U.S.C., Section 141 et seq. (hereinafter referred to as the "Act"). The pertinent provisions of the Act are printed in Appendix A, *infra*, pp. i-viii.

STATEMENT.

In December, 1949 and February, 1950, the International Association of Machinists filed separate unfair labor practice charges against petitioners Swiner-

---

[1]Petitioners also urged before the Court of Appeals that the finding of the National Labor Relations Board that petitioners refused to consider the claimants for employment because they were not affiliated with the Carpenters Union was not supported by substantial evidence on the record considered as a whole. This issue was erroneously decided against petitioners, and if certiorari is granted, such error would constitute an additional reason for reversal of the decree.

ton and Walberg Company and Jabez Burns & Sons, Inc., alleging that each of the petitioners refused to employ members of the Machinists Union on a construction project for the General Foods Company at San Leandro, California, because of an agreement, understanding or arrangement with the United Brotherhood of Carpenters and Joiners of America providing for an illegal hiring hall (R. 1-7).

After a hearing upon a consolidated complaint issued upon these charges, the Trial Examiner found that petitioners had each refused employment to applicants for work in the installation of machinery because of the applicants' membership in the Machinists Union or their lack of membership, association or referral from the Carpenters Union (R. 43-44). The National Labor Relations Board adopted this finding (R. 68), and ordered petitioners to cease and desist from discouraging membership in the Machinists Union or encouraging membership in the Carpenters Union, to make the applicants whole for any loss of pay suffered by them and to post the usual notices (R. 70-75).

The evidence as to petitioner Swinerton and Walberg Company showed the following:

On or about October 20, 1949, more than six weeks before petitioner began hiring men for machinery work on the General Foods Company project, a grand lodge representative of the Machinists Union engaged petitioner's field superintendent in charge of the project in conversation and was told by the superintendent

that petitioner had a contract with the AGC [Associted General Contractors of America] and could not use any one other than Millwrights [Carpenters] with a Millwrights clearance (R. 91-93, 98). A few days later two members of the Machinists Union spoke to the field superintendent on separate occasions regarding employment and were told that petitioner was a member of the Associated General Contractors and because of contractual obligations with the Building Trades Department of the American Federation of Labor it could only use Millwrights on machinery work (R. 101, 106). Still later, in the middle of November, 1949, two other members of the Machinists Union spoke to the field superintendent regarding employment, and when they revealed their union affiliation, the superintendent winked, said "I'm wise to you guys" and walked off (R. 110, 113). Three weeks later, commencing on December 5, 1949, petitioner's mechanical superintendent and mechanical foreman began hiring men to perform machinery work on the project (R. 201, 239, 244-245). The field superintendent did not have charge of the machinery work and did not hire any men for such work (R. 239).

All of the men who were ultimately employed by petitioner on machinery work at the General Foods Company project were either men already in the employ of petitioner who were transferred directly from other work (R. 210-211) or men transferred from work for petitioner Jabez Burns & Sons, Inc. (R.

212), or men who were known personally to petitioner's mechanical foreman or recommended by men known personally to such foreman (R. 212-213).

The Board and the Trial Examiner found that the mechanical foreman, who was a member of the Millwrights Union, notified the Millwrights when men were hired by him, and that no one was hired by petitioner for work on the project who to its knowledge was not a member of the Carpenters Union or one of the unions affiliated with that union (R. 39).

The evidence as to petitioner Jabez Burns & Sons, Inc., showed the following:

On or about October 25, 1949, a grand lodge representative of the Machinists Union was told by petitioner's foreman at the General Foods Company project that there was an agreement between petitioner's New York office and the Carpenters Union "that would confine them to hire only millwrights with millwright clearances" (R. 94-95). Thereafter, on November 11, 1949, a business agent for the Machinists Union drove four members of the Union from the Machinists hall to the General Foods Company project for the ostensible purpose of finding employment (R. 119-120, 125, 127, 131). Since Armistice Day was a building and construction industry holiday, they found no one at work (R. 120).

On the following Monday, November 14, 1949, the same business agent drove the same four men from the Machinists hall back to the General Foods Company project (R. 121, 125, 127). The men had been

instructed to see petitioner's foreman (R. 134) but they spoke to petitioner's subforeman instead. The subforeman told them that petitioner was not hiring any men then, because the concrete was green, but that it would be hiring men in a few days (R. 122). He also told them that "they would have to clear through the San Francisco Local of the Millwrights" (R. 118, 126). None of the men returned to the General Foods Company project when machinery work was available (R. 117, 129), although they were told to do so by petitioner's subforeman (R. 130).

Only five men were hired by petitioner after the Machinists last visited the project on November 14, 1949 (R. 181-183). Of these five men, one came from Los Angeles with petitioner's foreman (R. 181), another had worked with the foreman on many other jobs (R. 182) the third was a friend of the foreman's family who had worked with him many times (R. 182) and the last two were brought to the job by petitioner's subforeman (R. 182-183), who had worked with them before (R. 192).

The Board and the Trial Examiner found that petitioner's subforeman, a member of the Millwrights Union, reported to the Millwrights when men were hired by him, and that no one was hired for the project who to petitioner's knowledge was not a member of the Carpenters Union or one of its affiliates (R. 39).

The evidence established that at the time the alleged unfair labor practices occurred both petitioners

were bound by an area collective bargaining agreement dated July 14, 1948 between the Central California Chapter, The Associated General Contractors of America, Inc., and the Bay Counties District Council of Carpenters, A. F. L., fixing the wages, hours and working conditions of carpenters, including millwrights, on construction work in the four San Francisco Bay Area counties of San Francisco, Alameda, San Mateo and Marin (R. 137-138). The provisions of this agreement, which was introduced in evidence is Respondent Burns' Exhibit No. 1 (R. 139), are printed in full in Appendix B, *infra,* pp. ix-xviii.

The agreement of July 14, 1948, contained a conditional union-security clause providing as follows (R. 139-140):

> "17. Hiring. (a) There shall be no limitation of the employer as to whom he shall employ or discharge, except that any employee doing carpenters' work shall be, or within 30 days shall become, a member of a Carpenters Union affiliated with the Bay Counties District Council of Carpenters, excepting Superintendents not working with tools.
>
> (b) This Section shall become effective: (1) Upon certification of the Bay Counties District Council of Carpenters as the collective bargaining agent of the employees covered by this Agreement, by the National Labor Relations Board. (2) Upon certification by the National Labor Relations Board, as provided in Sections 8 (a) (3) and 9(d), of the Labor-Management Relations Act of 1947."

Petitioners offered to prove the following (R. 146-152):

Commencing in the month of March, 1948, the various building trades unions in Northern California informed the Joint Labor Relations Committee of the Northern California Chapter and Central California Chapter, The Associated General Contractors of America, Inc., that they were prepared to petition the National Labor Relations Board for representation elections and demanded that the contractors cooperate in expediting such elections.

The Joint Labor Relations Committee thereupon sent a subcommittee to Washington, D. C., to offer to the General Counsel of the Board the full facilities of the AGC Chapters in connection with the proposed elections, and to assure him that in cooperation with the Unions it would be possible to expedite representation elections throughout the entire Northern California area on a single area-wide pool basis. The subcommittee was assured by the General Counsel and his staff that after they completed three elections which had then been scheduled, they would conduct area-wide, industry-wide representation elections in the building and construction industry in Northern California. Thereafter the General Counsel notified the Committee that his office contemplated holding such elections in June, 1948.

The second of the three elections originally scheduled by the General Counsel, namely, the Detroit election, proved a failure, and thereupon the attempt

to conduct representation elections in the building and construction industry upon the labor-pool theory was shelved. The Joint Labor Relations Committee of the two AGC Chapters nevertheless continued its efforts to secure representation elections in the Northern California area, and in October, 1949, it again dispatched a subcommittee to Washington, D. C., to assure the General Counsel that the employers in the area were not only prepared to expedite the elections, but also were anxious that the elections be held. Nothing came of these efforts, and on December 19, 1949, the General Counsel announced in a formal release that his office was unable to conduct successful elections in the building and construction industry.

The Trial Examiner rejected petitioners' offer of proof (R. 152) and petitioners' argument based thereon, referring to the latter as a "plea in confession and avoidance" (R. 40, n. 8). Petitioners argued to the Board that it would not effectuate the policies of the Act to entertain the unfair labor practice proceedings against petitioners, or to direct the affirmative action by petitioners recommended by the Trial Examiner, for the reason that the proceedings grew out of a jurisdictional dispute between the Machinists Union and the Carpenters Union, which petitioners were powerless to remedy or control and which could not be adjusted or resolved under any of the procedures provided by the Act. The Board ignored this contention in its Decision and Order adopting the findings and recommendations of the Trial Examiner (R. 67).

In its brief before the Court of Appeals the Board acknowledged that the unfair labor practice charges grew out of "a long-standing jurisdictional dispute" between the Machinists Union and the Carpenters Union (p. 4). It argued, however, that its decision to exercise its jurisdiction in a particular case was not subject to judicial review "absent evidence of abuse of discretion," and that its "alleged" inability to conduct representation elections in the building and construction industry did not excuse the particular type of unfair labor practice with which petitioners were charged (pp. 22-23).

The Court of Appeals held that the Board's conclusion that petitioners had been guilty of unfair labor practices was supported by substantial evidence on the record considered as a whole (R. 272-273).

With regard to the principal questions presented on this petition, the Court said (R. 277-279):

> "The final contention made by respondents is that prosecution of unfair labor practices charges initiated by the Machinists against employers and unions in the building and construction industry does not effectuate the policies of the Act. (See § 10(c), Labor Management Relations Act of 1947, 29 U.S.C.A. § 160(c)). It is asserted that the order of the Board should therefore be set aside, and that enforcement of the order would constitute a violation of the Fifth Amendment of the United States Constitution.
>
> Whether the Board should assume jurisdiction in respect to a particular industry is in the absence of abuse of discretion exclusively for the

Board. N.L.R.B. v. Guy F. Atkinson Co., 195 F. 2d 141 (9 Cir. 1952); Haleston Drug Stores, Inc. v. N.L.R.B., 187 F. 2d 418 (9th Cir. 1951), cert. denied, 372 U.S. 815. We do not believe that prosecution of unfair labor practices of the type herein involved is beyond the scope of the Board's discretion merely because the practices take place within the building and construction industry. The Board asserted jurisdiction over the industry as early as 1948. See N.L.R.B. v. Guy F. Atkinson, supra, at 143.

It has been recognized that application of the Labor Management Relations Act of 1947 to the building and construction industry has created special difficulties peculiar to that and analogous industries. See Sen. Rep. No. 1509, 82d Cong., 2d Sess. (1952); Hearings on S. 1973 before Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, 82d Cong., 1st Sess. (1951); The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L. J. 673 (1951). One of the problems is the difficulty of conducting representation elections in suitable bargaining units within the building and construction industry, because of the migratory and intermittent nature of the employer-employee relationships. This problem is of course for Congress rather than the courts. We cannot say that prosecution of unfair labor practice charges within the industry will not effectuate the policies of the Act and will violate the Fifth Amendment solely because the Board has been unsuccessful in conducting representation elections. Even if such representation elections were held and particular unions certified

on the basis of the election results, the practice of requiring, as a condition to original employment, membership in or clearance from a union which discriminates in favor of its own members would still violate the Act."

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that it would effectuate the policies of the Act to prosecute unfair labor practice charges against employers in the building and construction industry at a time when, for over five years, employers and unions in such industry have been denied the benefits and protection of the representation provisions of the Act.

2. In holding that the enforcement of an order of the National Labor Relations Board against employers in the building and construction industry based upon unfair labor practice charges filed by the International Association of Machinists in furtherance of its jurisdictional claims does not constitute a denial of due process of law in contravention of the Fifth Amendment, where for over five years employers and unions in such industry have been denied the benefits and protection of the representation provisions of the Act.[2]

---

[2]As previously noted, the Court of Appeals also erred in holding that the conclusion of the Board that petitioners were guilty of unfair labor practices was supported by substantial evidence on the record considered as a whole. If certiorari is granted, such error would constitute an additional reason for reversal of the decree.

REASONS FOR GRANTING THE WRIT.

I.

EVER SINCE 1948, WHEN THE NATIONAL LABOR RELATIONS BOARD FIRST ASSERTED JURISDICTION OVER THE BUILDING AND CONSTRUCTION INDUSTRY, THE BOARD HAS FAILED AND NEGLECTED TO PROVIDE EMPLOYERS AND UNIONS IN THAT INDUSTRY WITH THE BENEFITS AND PROTECTION OF THE REPRESENTATION PROVISIONS OF THE ACT. IN VIEW OF THIS OMISSION, THE ENFORCEMENT OF THE UNFAIR LABOR PRACTICE PROVISIONS OF THE ACT AGAINST EMPLOYERS AND UNIONS IN THE INDUSTRY DEFEATS RATHER THAN EFFECTUATES THE POLICIES OF THE ACT, SINCE IT DISRUPTS INSTEAD OF STABILIZES LABOR RELATIONS IN THE INDUSTRY.

Under the original (Wagner) Act, the National Labor Relations Board refused to take jurisdiction over employers and unions in the building and construction industry as a matter of administrative choice (see *National Labor Relations Board v. Guy F. Atkinson Co.* (9th C. A. 1952) 195 F. (2d) 141, 143, *den. enf.* (1950) 90 NLRB 143). After the enactment of the Taft-Hartley Act in 1947, however, the Board changed its policy and determined to assert jurisdiction over the industry in all cases where its general "interstate commerce" standards were met (*National Labor Relations Board v. Guy F. Atkinson Co., supra,* p. 144; *The Plumbing Contractors Assn. of Baltimore, Md. Inc.* (1951) 93 NLRB 1081, 1084).

After the Board determined upon its new policy with relation to the building and construction industry, it encountered serious difficulties in applying the representation and union-security provisions of the Act to the industry. Such factors as the casual and

intermittent nature of employment in the industry, the large number of individual employers involved in each bargaining group and the extensive areas to be covered made it impossible to apply the principles and procedures developed in the regulation of industries with more stable labor-management relations.[3] These difficulties led the Committee on Labor and Public Welfare to report to the United States Senate on May 5, 1952, as follows (Report No. 1509 to accompany S. 1973, 82d Cong., 2d Sess., p. 6):

> "The committee finds that the normal election procedures of the Board have proven unadaptable to this industry because of the short-term, casual employment that is typical to it. The General Counsel's efforts to devise special means, such as the area-wide labor-pool election, for balloting appropriate groups of construction craftsmen, have proven fruitless. We conclude that the obstacles to conducting satisfactory elections in sufficient numbers are formidable, if not insuperable."

Pertinent extracts from the report of this Committee, stating in detail the factual basis for this finding, are printed in Appendix C, *infra*, pp. xix-xxviii.

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[3]See the testimony and statement of proposed enforcement policy of Robert N. Denham, then General Counsel of the Board, in connection with a hearing before the Board on December 19, 1949, which was specially set for the purpose of considering the problems of the industry (R. 155-160). See, also, the testimony of James J. Reynolds, Jr., Acting Chairman of the Board, and George Bott, the present General Counsel, at hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, Eighty-second Congress, First Session, on S. 1973 (Hearings, pp. 85-87, 187-212).

As a result of the Board's failure to devise workable procedures for applying the representation provisions of the Act to the building and construction industry generally, employers and unions in the industry have been denied the stabilizing protection of the union-security provisions of the Act. Conditional union-security clauses such as that contained in the collective bargaining agreement involved in this proceeding, quoted *supra*, p. 8, have never become effective because the Board has never been able to issue its certification to the union. Thus, in an industry where a high degree of union security has been traditional,[4] labor and management have been denied the benefit of any security provisions whatever.

The problems flowing from this denial of the benefits and protection of the Act would be serious enough, even in the absence of affirmative action by the Board to enforce the unfair labor practice provisions of the Act. For example, because of the failure of the Board to formulate principles and procedures whereby a determination could be made as to whether or not a union was an authorized collective bargaining representative subject to the provisions of Section 9 (a) of the Act, neither unions nor employers in the industry have been able to enforce the duty to bargain

[4]See Statement of Proposed Enforcement Policy of General Counsel Denham (R. 158). The United States Bureau of Labor Statistics reported in June, 1947, that over 80% of the workmen in the building and construction industry worked under union agreements in 1946, and that 94% of these were subject to closed-shop provisions or union-shop with preferential hiring provisions (Bulletin No. 909, June 24, 1947, pp. 2, 7).

collectively imposed on employers and unions respectively by Sections 8 (a) (5) and 8 (b) (3) of the Act.

Where, as in this case, the Board has acted affirmatively under the unfair labor practices section of the Act, the result has been to bring into sharp focus the fundamental injustice and disrupting effect of this one-sided administration of the Act.

This proceeding is not one to vindicate the right of individual workmen to employment without let or hindrance from a union. It was conceived and instigated by one union, the Machinists Union, as a means of furthering its jurisdictional controversy with another union, the Carpenters Union. It is a part of a campaign on a national scale to take advantage of the helpless situation of the construction industry employers and unions. See *Daniel Hamm Drayage Company, Inc.* (1949) 84 NLRB 458 (Alabama); *Lloyd A. Fry Roofing Company* (1950) 89 NLRB 854 (Oregon); *Arthur G. McKee and Company* (1951) 94 NLRB 399 (Texas); *General Electric Company* (1951) 94 NLRB 1260 (California); *The M. W. Kellogg Company* (1951) 94 NLRB 526 (Texas); *Utah Construction Co.* (1951) 95 NLRB 196 (Utah); *J. R. Cantrall Company* (1951) 96 NLRB 786 (California); *Whittenberg Construction Company* (1951) 96 NLRB 29 (Kentucky); *G. W. Thomas Drayage & Rigging Co., Inc.* (1951) 97 NLRB 703 (California); *Consolidated Builders, Inc.* (1952) 99 NLRB No. 135, 30 LLRM 1165 (Oregon); *The Lummus Company* (1953) 101 NLRB No. 238, 31 LLRM 1264 (Texas); *Eichleay*

Corporation (1953) 102 NLRB No. 63, 31 LLRM 1351 (Wisconsin); *George D. Auchter Company* (1953) 102 NLRB No. 79, 31 LLRM 1389 (Florida).

In each of the cited cases, as in this case, the International Association of Machinists or one of its local unions was the charging party, and a construction contractor alone, or a construction contractor and a building trades union, were respondents. Of this litigation, Mr. John J. O'Donnell, President of the National Constructors Association and member of the Advisory Committee appointed by Secretary of Labor Martin P. Durkin, testified on April 15, 1953, before the Senate Committee on Labor and Public Welfare as follows (Stenographic Transcript of Hearings on proposed Taft-Hartley Act amendments, p. 1953):

> "I might mention here a fact. Within the last two years members of our Association have expended in excess of $100,000 alone in defending suits filed by one International union,—the Machinists, charging us with discriminatory hiring practices. National Labor Relations Board hearings relating to these charges are being held in a dozen different areas. These hearings have been time-consuming, expensive for the government, and apparently, according to my personal experience, have accomplished nothing. **I do not believe that the purpose of that particular section of the Act was to provoke this type of legal harassment.**"

The pattern in this case is unmistakable: The project was reconnoitered by a grand lodge repre-

sentative of the Machinists Union (R. 91-99); all of the actual job applicants were members of the Machinists Union; in the case of petitioner Jabez Burns & Sons, Inc., the applicants were shepherded to and from the project on two occasions by a business agent for the Machinists Union (R. 119-121, 125, 127); all of the applicants were told that no machinery work was available at the time they applied, yet none of them returned when work was available (R. 103, 108-109, 117, 129); and the charges were filed by a grand lodge representative of the Machinists Union (R. 1-12).

If the conditional union-security clause in the contract which governed petitioners' operations could have been made effective in accordance with its terms, that is, by certification of the Bay Counties District Council of Carpenters as the collective bargaining agent of the employees covered by the agreement, the parties to that agreement would have been protected against the harassing jurisdictional raids of the Machinists Union. Petitioners' representatives could then have properly interrogated the job applicants concerning their union affiliation and have advised such applicants that under the terms of the applicable collective bargaining agreement they would have to become members of the Carpenters Union within 30 days after their employment. More importantly, any *sub rosa* efforts of any building trades union to retain its traditional union-security rights would have been unnecessary, and the employers covered by the agree-

ment could have established with full legal protection hiring procedures giving the Carpenters Union its full rights under the Act but protecting the employers against irresponsible statements of their job supervisors, many of whom traditionally come up from the union ranks and retain their union membership.

The distinction we draw here is one between compliance with clearly understood and reasonable regulations, uniformly applied, and the resort to borderline practices which results from the unreasonable and discriminatory withholding of rights which were hardly won and have been long enjoyed. Both the Board in its brief before the Court of Appeals (p. 23) and the Court of Appeals in its decision, *supra*, pp. 12-13, emphasize that petitioners' hiring policy, as found in this case, would have violated the Act even if the conditional union-security clause had become effective. The point is that petitioners did everything reasonably within their power to protect against violations of the Act. Their bargaining representative, the Central California Chapter of The Associated General Contractors of America, Inc., negotiated a collective bargaining agreement with the Carpenters Union which complied with the Act (Appendix B). Such representative made determined efforts to regularize petitioners' relations with the Carpenters Union through compliance with the representation provisions of the Act, (*supra*, pp. 9-10). This it was unable to do solely because of the Board's failure to provide

the necessary facilities, and the harassing action of the Machinists Union in this case resulted.

The facts of this case, wherein employers and a union in the building and construction industry have been denied the protection of the representation provisions of the Act against the jurisdictional raids of a non-building trades union, furnish but one illustration of the injustice and disrupting effect of the one-sided application of the Act to the industry.

This one-sided application of the Act has also resulted in the following:

1. It has placed in serious jeopardy the collective bargaining agreements which govern a major portion of the industry.

The collective bargaining agreement which governed petitioners' operations in this case (Appendix B) is typical of labor agreements in the building and construction industry generally.[5] The agreement is between an association of contractors on the one hand and a district council of the Carpenters Union on the other hand. It covers a large geographical area in Northern California consisting of the counties of San Francisco, Alameda, San Mateo and Marin. It undertakes to establish the wages, hours and working con-

[5]See testimony of Richard J. Gray, President of the Building and Construction Trades Department, AFL, and William E. Maloney, General President, International Union of Operating Engineers, at the hearings on S. 1973 before the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare of the United States Senate, 82d Cong. 1st Sess., pp. 25-29. See, also, Statement of Considerations of the Wage Stabilization Board published at the time it issued General Wage Regulation 12 setting up a special wage stabilization commission for the building and construction industry, 16 Fed. Reg. 6640.

ditions for all carpenters employed and to be employed during its term on construction projects in the area covered (Sec. 22; App. B, *infra,* p. xviii), and contains an express recognition of the Bay Counties District Council of Carpenters as the bargaining agent for such carpenters (Sec. 24; App. B, *infra,* pp. xvii-xviii).

The Board has stated that a contractor violates the Act when he executes an agreement granting exclusive recognition to a building trades union at a time when the union is not the representative of a majority of his employees in an appropriate collective bargaining unit covered by the agreement (*Consolidated Builders, Inc.* (1952) 99 NLRB No. 135, 30 LLRM 1165). It has also held that a building trades union cannot legally sign an agreement as the statutory representative of the employees of a contractor prior to the time that the contractor has a representative work force in his employ (*Guy F. Atkinson Co. and J. A. Jones Construction Co.* (1950) 90 NLRB 143, 145).

In the face of these decisions the validity of the area collective bargaining agreement involved in this proceeding, as well as of the thousands of similar agreements in effect in the industry, is in serious doubt in the absence of affirmative determinations by the Board as to the representative status of the unions involved.

In testifying on August 27, 1951, at hearings before the Subcommittee on Labor and Labor-Management

Relations of the Committee on Labor and Public Welfare of the United States Senate on S. 1973, 82d Congress, 1st Session, Mr. Richard J. Gray, President of the Building and Construction Trades Department, A.F.L., said (Hearings, p. 50):

> "If I may bring it out, we, as I stated in my testimony, have over a half a million contracts in effect in this country, and in none of them have we been certified. Experience has taught us that if any individual or any employer contests any one of those contracts, unless the National Labor Relations Board reverses its thinking or its administration, **not one of those contracts is worth the paper it is written on.**
>
> **Now, the policy of the act, as I understand it, was to stabilize management-labor relations. And I don't think that is going to do it, when that kind of a condition confronts you, counsel."**

The consequences which would flow from a holding that these agreements violate the Act are staggering to contemplate. For example, the parties to the agreement involved in this proceeding have now amended the agreement to establish a health and welfare plan for the carpenters covered by the agreement and other similar agreements which calls for employer contributions exceeding $4,000,000 annually. The Commissioner of Internal Revenue has ruled that such employer contributions are deductible as ordinary business expenses for Federal income tax purposes only if "none of the provisions of the Labor Management Relations Act of 1947 are violated." If the agreement were held to violate the Act, and if as a consequence the

employer contributions to the health and welfare plan were disallowed as deductions for income tax purposes, the result might well be the bankruptcy of many of the contractors covered by the agreement.

2. It has deprived employers and unions in the industry of the stability and protection of the union security provisions of the Act.

Under the terms of Section 8 (a) (3) of the Act, a union-shop agreement can only be executed with a union which is the representative of the employees as provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made. By reason of the Decisions of the Board in the *Atkinson-Jones* case and the *Consolidated Builders* case, *supra*, p. 22, no one can safely assume that a building trades union is the statutory representative of the employees covered by the type of collective bargaining agreement usually and customarily executed in the industry, in the absence of an affirmative certification of such fact by the Board.

On this subject, Mr. Richard J. Gray testified at the hearings on S. 1973 before the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare of the United States Senate, 82d Cong., 1st Sess., as follows (pp. 38-39):

> "Since the Board has not found it possible to carry out the election procedure of the act in the building and construction industry it is our opinion that it necessarily follows that building and construction trades unions are denied the right to enter into even the limited union security

contracts freely available to unions in other industries.

The impact of this situation upon employer-employee relations in the industry has been tremendous.

No industry in the country has had more stable collective bargaining relationships in the past than has the building and construction industry. The collective bargaining pattern built up in the past half century, which has worked so satisfactorily both from the point of view of the employer and the building and construction tradesmen is being completely destroyed and the entire industry is being plunged into a completely chaotic relationship due primarily to the election procedures established in the act."[6]

In connection with more recent hearings before the Senate Committee on Labor and Public Welfare on proposed Tart-Hartley Act amendments, Mr. Gray testified on April 21, 1953, as follows (Stenographic Transcript of Hearings, pp. 2302-2303):

"I shall not bore you with unnecessary repetitious details as regards the inability of the NLRB to hold representation elections in the building and construction industry. The record is unmistakably clear on this point. I refer you to the printed copy of the Hearings on Senate Bill 1973 held before the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, conducted during August and September, 1951.

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[6]Throughout this petition, emphasis is added unless otherwise noted.

The results of the NLRB not being able to conduct representation elections in the building and construction industry prevents our unions from obtaining Board certification. As we all know, certification is tantamount to receiving the Board's blessing to do many things not otherwise permitted. *Without it all our contracts are open to attack, and in my opinion and in the opinion of competent legal counsel our union shop contracts are good only so long as they are not contested before NLRB.*"

3. It has denied to the multi-employer area-wide bargaining units, which are customary in the industry, protection against the inroads of single-employer shop or plant units.

The multi-employer area-wide bargaining unit, which is exemplified by the unit covered by the agreement involved in this proceeding, is typical of bargaining units in the building and construction industry generally. If the union which is a party to the agreement covering such a unit has been certified by the Board, the agreement is an effective bar to the representation claims of competing unions which seek to expand single-employer shop or plant units to include employees on construction projects. In the absence of such certification, however, the Board can and will include workmen employed on construction projects within single-employer plant or shop units, thereby disrupting the multi-employer unit which is so important to stability in labor-management relations in the industry (see *Stewart & Nuss, Inc.* (1952) 97 NLRB 1250; *W. B. Willett Company* (1949) 85 NLRB 761; *Guy F. Atkinson*

and *J. A. Jones Construction Company* (1949) 84 NLRB 88; *Operating Engineers Local Union No. 3 v. Brown* (D.N.D. Cal. 1952) 21 CCH Labor Cases, par. 66,839).

In *W. B. Willett Company, supra,* wherein the Petitioner Machinists Union sought a single-employer unit consisting of all machinists and millwrights employed on a dam construction project in Northern California, the Board said the following concerning the efforts of the Intervenor Carpenters Union to protect its multi-employer bargaining unit in the area (85 NLRB 762):

> "We reject the Intervenor's contention that because work in the construction industry is sporadic in nature, the appropriate unit should be a multi-employer unit. We have found appropriate a unit of machine shop employees of a single Employer engaged in the construction industry. As there is no evidence in the record of a collective bargaining history for the employer on a multi-employer basis, we find that the single-employer unit sought by the Petitioner is appropriate."

These traditional multi-employer units must be preserved and protected if the policies and objectives of the Act are to be effectuated insofar as the building and construction industry is concerned. They are composed, on the side of management, of the established, responsible contractors who have by far the greatest stake in the stability, efficiency and prosperity of the industry. On the side of labor, the

employees are represented by building trades unions which, through years of effort and service, have established wages, hours and working conditions that are the envy of workmen in most other industries. Because of the casual nature of employment in the industry, building tradesmen cannot exercise their right to organize and bargain collectively unless they do so through these multi-employer units and therefore, if the units are destroyed, rights guaranteed to them by the Act are likewise destroyed.

The single-employer shop or plant units which are beginning to encroach upon the multi-employer units because the latter are not protected by Board certifications cannot possibly secure to building tradesmen their right to effective and efficient collective bargaining. The contractors involved in the single-employer units are generally on the fringe of the industry, since they have shop or plant operations in addition to their construction activities. The unions involved are generally shop or plant unions, such as the Machinists Union, instead of the building trades unions which have had years of experience in the industry. Therefore, neither the representatives of management nor the representatives of labor in these units have the requisite interest or experience to negotiate the wages, hours and working conditions which would best serve the needs of the building tradesman.

4. It has denied to unions in the industry the right to enforce the statutory obligation of employers to bargain collectively, and to employers in the industry the right to enforce the statutory obligations of unions to bargain collectively.

Under Sections 8 (a) (5) and 8 (b) (3) of the Act, the right of a union to demand that an employer bargain collectively with it is dependent upon its status as the representative of his employees "subject to the provisions of Section 9 (a)," and the right of the employer to demand that a union bargain collectively with him is also dependent upon the union's status as such representative. The inability of the Board to devise workable procedures for the determination of the representative status of building trades unions has nullified these rights insofar as the building and construction industry is concerned.

5. It has denied to building trades unions the rights and benefits conferred upon certified unions by Sections 8 (b) (4) (B), 8 (b) (4) (C) and 8 (b) (4) (D) of the Act.

In *General Box Company* (1949) 82 NLRB 678, the Board pointed out that certification pursuant to the representation provisions of the Act confers many important privileges and immunities upon a union. It said (pp. 680-681):

> "Furthermore, if we were to treat the Employer's recognition of the Petitioner in this case as negating the existence of a question concerning representation, we would be compelled to deny the petitioning union an opportunity to secure still other benefits which the amended statute reserves to *certified* unions. Under Section 8 (b) (4) (B), for example, it is only a *certified* union

that can lawfully induce the employees of some 'other employer' to engage in a strike or other concerted activity for the purpose of compelling the primary employer to recognize it. The legality of certain concerted activities sponsored by one union in aid of another union's effort to secure recognition, too, depends upon whether or not the latter union is certified. Moreover, a Board *certification* is a defense in certain situations where a respondent union is charged with engaging in a strike or other concerted activity in support of a jurisdictional dispute within the ambit of Section 8 (b) (4) (D) of the Act.

These statutory privileges and immunities that accompany certification are not the only significant advantages that accrue to certified unions, as distinguished from those that enjoy recognition without certification. Under the so-called 'one-year rule' enunciated by the Board long before the 1947 amendments were enacted, a certified union's right to recognition as the exclusive bargaining agent is stabilized and fully protected for a 'reasonable' period of time, ordinarily 1 year from the date of certification. This rule operates to limit the freedom of the employees to select and change their bargaining representative at will, once they have selected a union in a secret ballot encouraging and stabilizing collective bargaining in the interest of industrial peace; it endows a *certified* union's status with a measure of security and permanence not enjoyed by a union whose majority standing and right to recognition is established otherwise than by Board election and certification." (Emphasis is by the Board.)

From the foregoing, it is apparent that the application of only one part of the Act, namely, the unfair labor practice provisions, to the building and construction industry at the same time that the protection and benefits of the representation provisions are being administratively withheld from the industry, results in injustice and the disruption of labor-management relations.

The Board itself, in *The Plumbing Contractors Assn. of Baltimore, Md. Inc.* (1951), 93 NLRB, 1081, said (p. 1086):

> "If, as we think it must, the Board is to continue in appropriate cases to process complaints and issue cease and desist orders against labor organizations in the building industry, it would be most inequitable for the Board, at the same time, to deny to labor organizations the benefits which accrue from certification when, in appropriate cases, our jurisdiction is invoked. **We do not believe that Congress intended that in this industry the Board would wield the sword given it by the Act, but that labor organizations desiring it should be denied the shield of the Act.** We believe, rather, that in providing that certain benefits would flow from certification, Congress intended that the shield should go with the sword, and that the Board should to this end assert jurisdiction in representation and union-security authorization cases to the same extent and on the same basis as in unfair labor practice cases. Unless and until Congress, for reasons of policy, provides otherwise by appropriate legislation, we must proceed on that basis. **We could not take**

> **any other course without flouting the will of Congress as now expressed in the 1947 statute."**

With regard to the disrupting effect upon the industry of the Board's one-sided administration of the Act, the Committee on Labor and Public Welfare, in reporting favorably to the United States Senate on proposed amendments to the Act, said (Report No. 1509, May 5, 1952, to accompany S. 1973, 82d Cong. 2d Sess., p. 1; App. C, *infra,* p. xix):

> "The amendments are intended to remedy the **hardships and disruption of labor relations** which have resulted from the proven impracticability of accommodating the normal doctrines and election procedures of the National Labor Relations Act to the building and construction industry."

Notwithstanding the Board's statement in the *Baltimore Plumbers* case, quoted, *supra,* concerning the unfairness of its one-sided application of the Act, the Board has not to this date applied the representation provisions of the Act to the building and construction industry generally.

In testimony before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Congress, 1st Session, on S. 1973, George Bott, the present General Counsel for the Board, said (Hearings, pp. 196-197):

> "My point is that we should not take the Baltimore and Olean cases as an indication that we are prepared to hold these elections in a very

simple fashion because the problems are not the same.

* * * * * * *

Senator Humphrey. Is it not fair to say that because you have staked out this jurisdiction and because you have taken the action you have taken up to now that it would be almost incumbent on the Board to continue its elections in every instance of the building trades?

* * * * * * *

Mr. Bott. That is my view.

* * * * * * *

* * * If the union is still interested in an election, and I have had some meetings with some of the unions and some of the employers, we are preparing again to make another attempt to do the job. We are going to try first a large association of employers on one petition by one A. F. of L. union, perhaps in California.

We have just started, and it is a long job. I do not know where we will end up."

The "large association of employers" to which Mr. Bott referred was the Central California Chapter and the Northern California Chapter, The Associated General Contractors of America, Inc. It is a matter of record with the Board that the election proceedings involving this association have now aborted, and there is no evidence that the Board is making any other attempt to do the job.

II.

WHERE AN ORDER OF THE BOARD UNDER THE UNFAIR LABOR PRACTICE SECTIONS OF THE ACT DOES NOT EFFECTUATE THE POLICIES OF THE ACT, SUCH ORDER IS IN EXCESS OF THE BOARD'S DELEGATED AUTHORITY AND SHOULD BE SET ASIDE.

The Court of Appeals took the view that the one-sided administration of the Act of which petitioners complain is a problem "for Congress rather than the courts" (*supra,* p. 12).

It is true that the problem has been and is being presented to Congress, and that legislative relief is being sought (see Hearings before the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, U. S. Senate, 82d Cong., 1st Sess., on S. 1973; Senate Report No. 1509, 82d Cong., 2d Sess., App. C, *infra,* pp. xix-xxviii). Petitioners contend, however, that the Act as construed by this Court contains within itself adequate safeguards against a one-sided administration, whereby the unfair labor practice provisions are enforced to the hilt while the protection of the representation provisions is withheld.

The authority delegated to the Board to enforce the unfair labor practice provisions of the Act is circumscribed by the requirement that such enforcement "effectuate the policies of the Act" (*Labor Board v. Fansteel Corp.* (1939) 306 U.S. 240; *Republic Steel Corp. v. Labor Board* (1940) 311 U. S. 7, 12; *Phelps Dodge Corp. v. Labor Board* (1941) 313 U.S. 177, 187; *Southern S.S. Co. v. Labor Board*

(1942) 316 U.S. 31, 46; *Labor Board v. Gullett Gin Co.* (1950) 340 U.S. 361, 362).

In *Labor Board v. Fansteel Corp., supra,* this Court struck down a Board order directing the reinstatement of unfair labor practice strikers who had engaged in sitdown tactics, saying (p. 258):

> "We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."

In *Colgate Co. v. Labor Board* (1949) 338 U.S. 355, this Court said (p. 362):

> "To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."

As we have shown (*supra,* pp. 14-33), experience over the past five years has demonstrated that application of the unfair labor practice provisions of the Act to the building and construction industry while the protection of the representation provisions has been withheld has caused "hardships and disruption of labor relations". The Board itself concedes that such application is "inequitable" and flouts the will of Congress (*supra,* pp. 31-32).

The fact that the application of the Act to the building and construction industry has caused disrup-

tion rather than stability in labor relations is not surprising, in view of the manner in which the industry was included under the Act. As we noted at the outset (*supra,* p. 14), the Board, as a matter of administrative choice, did not apply the provisions of the original Wagner Act to the industry. Congress knew of this administrative practice and when it enacted the Taft-Hartley Act in 1947, it did not realize that it was legislating generally with regard to that industry.

In questioning Mr. Richard J. Gray, President of the Building and Construction Trades Department, A.F.L., on April 21, 1953, at hearings before the Senate Committee on Labor and Public Welfare on proposed Taft-Hartley Act Amendments, Senator Taft said (Stenographic Transcript, p. 2313):

> "Senator Taft. Mr. Gray, the thing that interests me most in this building trade business is that under the Wagner Act my recollection is that the Board did not apply the Act to building trades in general. I do not know. Was there any application of it to the building trades?
>
> Mr. Gray. I do not know of any instance where the Board took jurisdiction over the building and construction trades industry under the Wagner Act.
>
> Senator Taft. Relying on that history, and the fact that we did not in any way change the definition of interstate commerce when we amended the Wagner Act to be the Taft-Hartley Law, **I certainly was under the impression during the consideration in 1947 that we were not dealing fundamentally with building trades.** There might have been a few practices covered in the new Act, but **certainly we had no intention to**

change the concept of jurisdiction of the building trades."

At a later stage of the hearings, in questioning another witness on April 30, 1953, Senator Taft reiterated his point, saying (Stenographic Transcript, p. 3385):

> "I think when this law was passed, Taft-Hartley, we did not think it covered, or at least I did not understand that it covered, building trades. In fact, the Wagner Act did not cover them, and the Wagner Act had exactly the same language as the Taft-Hartley law."

Thus, while Congress did not act in 1947 with the special problems of the building and construction industry in mind, the results of its action have been administratively applied to the industry, without discrimination, and with no apparent regard to the general guide established by Congress that the policies of the Act be effectuated.

In these circumstances it cannot be truthfully contended that the continued application of the unfair labor practice provisions of the Act to the industry, while the benefits and protection of the representation provisions are being withheld, "effectuates the policies of the Act".

Congress enacted a single statute giving the Board two principal functions, namely, (1) "the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees" and (2) "the prevention by the Board's order after

hearing and by a further appropriate proceeding in Court, of the unfair labor practices enumerated in § 8" (*A. F. of L. v. Labor Board* (1940) 308 U.S. 401, 405). Congress did not say that if the Board could not perform the first of these functions with relation to an industry, it should nevertheless perform the second function with relation to the industry. It clearly implied the contrary, since the numerous cross-references in the unfair labor practice section (section 8) to the representation section (section 9) demonstrate that in the view of Congress the provisions of the two sections were inextricably interwoven (App. A, *infra,* pp. ii-viii). Therefore, since the Board has not devised workable principles and procedures for the performance of the certification function in the building and construction industry, the enforcement of the unfair labor practice provisions against employers and unions in the industry will no longer effectuate the policies of the Act.

III.

IN VIEW OF THE FAILURE OF THE BOARD TO APPLY THE REPRESENTATION PROVISIONS OF THE ACT TO THE BUILDING AND CONSTRUCTION INDUSTRY, THE ENFORCEMENT OF ITS ORDER IN THESE UNFAIR LABOR PRACTICE PROCEEDINGS CONSTITUTES A DENIAL OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Board has accorded all other industries over which it has asserted jurisdiction the benefit and protection of the representation provisions of the Act. The building and construction industry has been singled out as the one industry in which the unfair

labor practice provisions of the Act have been enforced, while the representation provisions have remained unused and ineffective for all practical purposes.

There is no rational basis for this discrimination against the building and construction industry. The problem of determining the majority representative of an appropriate unit of building tradesmen is not so complex and difficult as to justify withholding certification of such units while nevertheless enforcing the unfair labor practice provisions of the Act, some of which are tied in directly with the certification provisions. The Board itself has acknowledged the unfairness of its treatment of the industry (*Matter of Plumbing Contractors Association of Baltimore, Maryland, Inc.* (1951) 93 NLRB 1081, 1083), yet it continues to withhold any effective relief.

While the Fifth Amendment does not contain an equal protection of the laws clause similar to that of the Fourteenth Amendment, it is recognized that administrative action of a Federal agency may be so grossly discriminatory as to contravene the requirements of due process of law (see *Hamilton Nat. Bank v. District of Columbia* (App. D.C. 1946) 156 F. (2d) 843, 846 (1949) 176 F. (2d) 624, *cert. den.*, 338 U.S. 891). We respectfully submit that the discriminatory treatment which the Board has accorded to employers and unions in the building and construction industry during the past five years falls into this category, and that for this reason enforcement of its order in this proceeding should be denied.

IV.

THE IMPORTANT QUESTIONS PRESENTED BY THIS PETITION SHOULD BE SETTLED BY THIS COURT IN ORDER TO RELIEVE THE BUILDING AND CONSTRUCTION INDUSTRY OF THE DISRUPTING EFFECTS OF THE BOARD'S ONE-SIDED ADMINISTRATION OF THE ACT.

Petitioners do not underestimate the gravity of the step they ask this Court to take. They seek a decision which, in its broadest aspect, would stay the enforcement of the unfair labor practice provisions of the Act, insofar as the building and construction industry is concerned, until the Board has devised workable procedures and principles for applying the representation provisions of the Act to the industry.

This Court alone can decide such a question with authority and finality.

The Court does not need to be told of the size and importance of the building and construction industry. Neither need it be told of the great value and importance of the contract and other rights at stake.

Labor relations in the industry *are* being disrupted by the Board's policy. That, no one, not even the Board, denies.

The solution suggested by the Board has been to report the facts to Congress, and to await Congressional action, meanwhile enforcing the unfair labor practice provisions of the Act without restriction or qualification (App. C, pp. xxvii-xxviii).

The unfairness of this solution is obvious. Legislation in this field is highly controversial, and effective relief might be postponed for years by considerations of partisan politics.

The solution is likewise an undesirable one from the standpoint of the proper administration of the Act. This Court has said that Congress has laid down a sufficient standard and guide for the Board in the administration of the Act, namely, the standard of "effectuating the policies of the Act" (*Pittsburg Glass Co. v. Board* (1941) 313 U.S. 146, 165; *Phelps Dodge Corp. v. Labor Board* (1941) 313 U.S. 177, 189). This standard is meaningless if, whenever the literal application of the provisions of the Act to an industry defeats rather than effectuates the policies of the Act, the Board must turn to Congress for an amendment to the Act. If the standard is to have significance, the courts must exercise their clear authority to set aside the action of the Board in every situation where it is established that such action does not effectuate the policies of the Act.

The principle for which petitioners contend has application and importance far beyond the limits of this particular case. Here is a major industry which was included within the purview of a regulatory statute by administrative action at a time when the special problems of the industry had not been given deliberate attention by Congress (*supra,* pp. 36-37). The result has been chaos and disruption in labor relations which are directly contrary to the objective sought by Congress in the enactment of the statute. If the individual citizen is to have prompt and effective protection against the injustices of such a result, such protection must come from the courts—particularly where, as here, the administrators acknowledge

the problem but are unwilling to supply the remedy on their own initiative.

Petitioners contend that until means have been devised for applying the representation provisions to the building and construction industry, the Act requires that the Board stay its hand in the enforcement of the unfair labor practice provisions against employers and unions in the industry. It is of vital importance to the due administration of the Act that the Board be so directed by this Court at the earliest practicable date.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
May 14, 1953.

Respectfully submitted,
GARDINER JOHNSON,
Counsel for Petitioners.

JOHNSON & STANTON,
THOMAS E. STANTON, JR.,
Of Counsel.

(Appendices A, B and C Follow.)

Appendix A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. IV, sec. 151, *et seq.*), are as follows:

Findings and Policies

Section 1.

* * * Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employ-

ment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has

reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft,

or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

REPRESENTATIVES AND ELECTIONS

Sec. 9.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of

the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any

unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

Appendix B

RESPONDENT BURNS' EXHIBIT NO. 1. [R. 139-140.]

BAY COUNTIES CARPENTERS' AGREEMENT.

THIS AGREEMENT entered into this 14th day of July, 1948 between the CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. in behalf of their members and other Employers or Employers' Associations who may become parties signatory hereto, hereinafter referred to as "The Employers," and the Bay Counties District Council of Carpenters, A. F. L., in behalf of its member Unions, hereinafter referred to as "The Carpenters" in order to stabilize the wages, hours, and working conditions of Carpenters employed on construction work in the Counties of San Francisco, Alameda, San Mateo and Marin, hereby agree to the following:

WORKING CONDITIONS

1. EIGHT HOURS will constitute a day's work, except as otherwise noted. Where part of an 8-hour day is worked pro-rata rates for such shorter periods will be paid.

2. FIVE DAYS, consisting of not more than eight hours a day, on Monday to Friday, inclusive, shall constitute a week's work.

3. WAGES. The rate of wages for journeymen carpenters shall be $2.16 per hour for employment during the regular hours. The rate of wages for hardwood floor layers, shinglers and millwrights shall be $2.28½

per hour for employment during the regular hours. (The above scale is in accordance with the arbitration agreement, dated June 24, 1948 and the arbitration award, dated July 4, 1948.)

4. (a) OVERTIME shall be paid as follows: For the first eight hours, time and one-half. All time thereafter shall be paid double time. Saturdays, Sundays and Holidays, from midnight of the preceding day, shall be paid double time. When one regular daylight shift is being worked and men are required to report for work before 8 A. M. they shall be paid double time prior to 8 A. M.

(b) In order to stabilize the forty (40) hour week, overtime work, referred to as emergencies, shall be regulated and permitted as follows: (1) On a concrete pour provided that same has been commenced between the hours of 8:00 A. M. and 5:00 P. M. Monday to Friday inclusive, and (2) in the case of damage *or threatened damage* due to fire or other elements whereby the health and safety of life and property is endangered. Any exceptions to the above shall be approved by the Conference Board.

5. Where TWO SHIFTS are worked in any twenty-four hours, eight (8) of said hours between 8 A. M. and 5 P. M., shift time shall be straight time. Where THREE SHIFTS are worked, overtime equal to one hour's pay shall be paid on all shifts. Where two shifts are worked, the first beginning at 8 A. M., the second shift shall work seven (7) hours and receive eight (8) hours pay.

6. ALL WORK, except as noted in paragraphs 5 and 9, shall be performed between the hours of 8 A. M. and 5 P. M.

7. (a) RECOGNIZED HOLIDAYS will be New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Admission Day, Thanksgiving and Christmas Day.

(b) The work day shall end at 3 P.M. on all County, State and Federal election days. There shall be no compensation for hours not worked.

8. (a) Men ordered to report for work, for whom no employment is provided, shall be entitled to two hours pay, except in cases where bad weather or other conditions beyond the Employers' control, prevents employment.

(b) Except as hereinafter provided carpenters who start work but are discharged between the hours of 8 A. M. and 12 noon, shall receive four (4) hours pay; carpenters starting work at 8 A. M., but who are discharged between the hours of 1 P. M. and 5 P. M., shall receive eight (8) hours pay. Carpenters discharged for inefficiency on the first day of employment, or for insubordination or intoxication, shall receive pay for hours worked only. Carpenters who quit the job voluntarily shall receive pay for hours worked only.

9. IN EMERGENCIES where premises cannot be vacated in whole or in part until the close of business, men then reporting for work shall be paid time and

one-half to midnight. Any work performed on such jobs after midnight shall be paid double time.

10. ONLY TWO CLASSIFICATIONS of mechanics are recognized in the craft—Journeymen and Apprentices.

11. JOURNEYMAN CARPENTER. The term "Journeyman Carpenter," as used herein means an employee who is qualified by experience and ability to perform work with carpenters' tools, or such other tools as are necessary in the performance of carpenter work. All work performed with carpenters' tools shall be done with journeymen carpenters and/or apprentices, except the following may be done by either carpenters or laborers at the option of the employer:

(a) Stripping of concrete forms. (b) Removing of scaffolds. (c) Removal of materials and man hoisting towers. (d) Wrecking for alterations and reconstruction. (e) Placing and removing of concrete runways. (f) Distributing and handling of building materials from point of delivery to point of installation. (g) Drilling of holes in brick or concrete for attaching the work of carpenters. (h) Removing of sidewalk pedestrian safeguards.

It is agreed that all work in connection with the building and erection of timber trusses, and framing, assembling and building of the trusses, the raising and putting them in place and the rigging and signalling when power equipment is used, is under the jurisdiction of the United Brotherhood of Carpenters, and all work referred to above shall take the carpenters construction scale, as provided for in this agreement.

12. APPRENTICE CARPENTER. The term "Apprentice Carpenter" as used herein, means an employee undergoing a system or course of training in carpenter work, who shall be permitted to perform any work done by a journeyman carpenter, as provided in Section 13, and whose age when starting his apprenticeship is over eighteen (18) but not over twenty-four (24) years. The term of apprenticeship shall not exceed a period of four years. It shall not be a contractual obligation, but it shall be the policy of the employers, party to this agreement, to employ apprentices who might have been laid off due to lack of work before employing new apprentices.

13. APPRENTICES. The hours, wages and working conditions for apprentices shall be determined by a Joint Apprentice Committee composed of equal representation from the parties hereto and the decisions of this Committee shall become a part of this Agreement.

14. CONTRACTING. No work will be let by piece, contract or lump sum, direct with journeymen or apprentices for labor services, and carpenter work, including the installation of sheetrock, plywood, wallboard and similar materials, will be done by the general contractor or builder direct with carpenters, except that the installation of hardwood flooring and shingles, acoustical and other such materials usually subcontracted before the emergency, may continue to be subcontracted, provided the subcontractor furnishes all material, equipment and labor and com-

pensates his carpenters on a straight per diem basis. When the market conditions are such that it is necessary for the general contractor to assist the above mentioned subcontractors in the procurement of necessary materials, such assistance shall not be deemed a violation of this contract, provided the contractor notifies the District Council of Carpenters prior to such proposed arrangements.

15. TOOLS. Carpenters and apprentices shall furnish their own tools, but shall not furnish sawhorse, ladders, mitre boxes, electric drills, or any kind of power operated machines or saws.

16. CONFERENCE BOARD. The parties hereto shall set up a Conference Board composed of ten (10) members; five (5) to be appointed by the employers and five (5) to be appointed by the employees:

(a) To establish the general recognition of the wages, hours and working conditions to this agreement. (b) To hear and adjust disputes or differences that may arise in the enforcement or interpretation of this agreement between the parties hereto. (c) To make such provisions for the employment and regulation of handicapped workers as it may consider necessary. (d) To promote the mutual interests of the parties to this agreement and the building industry generally.

17. HIRING. (a) There shall be no limitation of the employer as to whom he shall employ or discharge, except that any employee doing carpenters' work shall be, or within 30 days shall become, a member of a

Carpenters Union affiliated with the Bay Counties District Council of Carpenters, excepting Superintendents not working with tools.

(b) This Section shall become effective: (1) Upon certification by the Bay Counties District Council of Carpenters as the collective bargaining agent of the employees covered by this Agreement, by the National Labor Relations Board. (2) Upon certification by the National Labor Relations Board, as provided in Sections 8 (a) (3) and 9 (d) of the Labor-Management Relations Act of 1947.

18. All complaints of alleged violations of this agreement, between the parties hereto, shall be referred to the Joint Conference Board and its decision shall be final.

19. In the event that disputes or disagreements arise between the parties hereto and/or other groups in the building industry that threaten to adversely affect the interests of either party to this agreement no action will be taken by either party that will halt or interrupt the orderly conduct of business, but the matter will be referred to and dealt with by the Joint Conference Board and its decision shall be final.

20. This Agreement shall remain in effect until May 1, 1949, and shall continue to remain in full force and effect thereafter, provided it shall be subject to change or modification on notice being served, in writing, by either party upon the other party not later than January 10 of any year. If either party hereto serves such written notice upon the other party

hereto, it must, at the same time, serve such written notice upon all parties signatory to this or an identical agreement. Following the receipt of such notice the other party to the agreement may notify the first party serving said notice, in writing, not later than February 10 of such changes or modifications it desires to make in the Agreement. Following the giving of such notice, or notices, the parties shall meet not later than February 15 and proceed to negotiate as to the change or modification mentioned in the notices, the Agreement remaining in effect at all times until the conclusion of the negotiations and an agreement reached upon any changes or modifications. Following such agreement a supplement to this Agreement shall be entered into and executed not later than May 1 to be effective as of June 15 of such year, which Supplement shall designate the changes that have been agreed upon and except as to such changes the Agreement shall remain in full force and effect unchanged.

In the event that an agreement cannot be reached on any or all subjects under discussion at the time of the negotiation proceedings prior to May 1, then an Arbitration Board shall be set up duly authorized to decide all points not agreed upon. This Board shall be selected and the Briefs shall be submitted to same by May 20. Not over ten days shall be allocated to the Arbitration proceedings.

The Arbitration Board shall render its decision not later than five (5) days following the close of arbitration hearings, to be effective June 15, subject to the provisions of this Section 20.

In the event that a change or modification in the Agreement is established by negotiation or arbitration, all jobs in progress, contracted for, or upon which bids have been accepted or submitted, shall be completed at the scale of wages and hours in effect prior to the effective date of said change or modification.

No decision made by an Arbitration Board shall be retroactive.

21. It is mutually agreed between the parties signatory hereto that in case of arbitration, any other employing organization which has in effect and is observing an agreement with the Bay Counties District Council of Carpenters, or which is observing this above agreement, shall be given an opportunity of submitting briefs in the arbitration proceedings. In case of submission of said briefs, written notice must be served to the undersigned of the intention to submit briefs at least one week prior to said submission.

22. It Is Agreed that the wages, hours and working conditions of this Agreement are the wages, hours and working conditions in the area covered by the Agreement.

23. It Is Agreed that the Carpenters, through their business agents, use their efforts to encourage greater efficiency on the job and that they refrain from the solicitation of premium payments for members of their Unions.

24. It is mutually agreed between the parties signatory hereto that said signatories shall form and be recognized by each other as the bargaining agency

for the purpose of negotiations and contracts concerning the wages, hours and working conditions of carpenters in the area covered by this Agreement.

25. TERMINATION. This Agreement may be terminated as of May 1st of any year by either party serving written notice upon the other at least six months prior to aforesaid May 1st of their intention and desire to terminate said Agreement.

CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.	BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS
By s/Art B. Smith	By s/Joe O'Sullivan
Art B. Smith, Vice-President	President
By s/Wm. E. Hague	By s/D. H. Ryan
Wm. E. Hague, Secy.-Manager	Secretary
	By
	Representative

Appendix C

Following are pertinent extracts from Senate Report No. 1509, 82d Congress, 2d Session, of the Committee on Labor and Public Welfare to accompany S. 1973:

The Committee on Labor and Public Welfare, to whom was referred the bill (S. 1973) to amend the National Labor Relations Act, as amended, and for other purposes, having considered the same, report favorably thereon with amendments, and recommend that the bill, as reported, do pass.

The Purpose of the Bill

This bill, which is limited to the building and construction industry, would amend the National Labor Relations Act, as amended, by—

(1) Permitting the execution of collective bargaining agreements prior to the hiring of employees;

(2) Permitting labor agreements which require membership in the contracting union on or after the seventh day following employment;

(3) Permitting such agreements despite any other provision of the act or any other Federal, State, or Territorial law;

(4) Requiring that a labor organization executing such a contract be in compliance with the financial statement and non-Communist affidavit filing provisions of the present act; and

(5) Providing for an expedited election in which employees covered by a contract permitted under the bill could choose another bargaining representative.

These amendments are intended to remedy the hardships and disruption of labor relations which have resulted from the proven impracticability of accommodating the normal doctrines and election procedures of the National Labor Relations Act to the building and construction industry.

Summary of the Bill

The bill, which is limited to this industry, would permit such union security agreements in language which parallels that of the first proviso to section 8 (a) (3) of the National Labor Relations Act, as amended by Public Law 189, Eighty-second Congress (S. 1959). Union security agreements would thus be practical for the first time since 1947 in this industry, which is characterized by short and intermittent terms of employment. In addition, it would sanction the execution of such agreements before employees are hired or a representation election is held. In this way contractors, labor organizations, and employees could know in advance of each project what labor costs, wages, and other conditions of employment are to be, as they must, because of factors, such as short-term employment and competitive bidding for construction contracts, which are peculiar to this industry. This industry is highly organized and has a long history of collective bargaining.

These factors, and other testimony before the committee, demonstrate that normally building-trades unions represent a majority of employees who regularly perform construction work in any given area. Under the circumstances, representation elections tend to be less necessary and serve less purpose than in other industries which are not as evenly organized. Prohibitively expensive elections, which the Board has attempted to hold, usually without success, are eliminated.

ECONOMIC FACTORS PECULIAR TO THE BUILDING AND CONSTRUCTION INDUSTRY

Unlike most manufacturing and service industries, the building and construction industry is characterized by casual, intermittent, and often seasonal employer-employee relationships on separate projects undertaken pursuant to contracts let by competitive bidding. Contractors' operations are not continuous. Rather, individual projects, often with substantial lapses of time separating them, are the rule. This pattern requires a great deal of technical planning and the concentration of considerable amounts of funds, equipment, and skilled labor for each individualized project. The standardization of costs that results from continuous operations in the manufacturing and service fields is not present in this area and must be attained in other ways. The industry has adapted itself to these special factors pragmatically and has evolved certain institutions and practices to meet its requirements. Labor-management legislation

applicable to this industry must take account of these functional habits.

Both employers and employees are highly organized in National, State, and local associations and unions, and these groups deal with each other at those levels. Each contractor obtains contracts on the basis of competitive bidding for single projects. Each project is special and highly individualized in design, although the type and amount of skilled work to be done is somewhat standardized.

It is obvious that before a bid is submitted, the contractor must estimate his material and labor costs. The former is determined by known market prices. The latter, whether the contractor is to perform the work with his own employees or those of a subcontractor, must also be determined in advance if bids are to be realistic (p. 42). Uncertainty leads to overestimation and hence higher construction costs, or, improperly low bids which result in losses or unfulfilled contracts (pp. 27-30, 169). The United States Government, in addition to its interest in the general welfare and the vigor of the economy, is directly concerned in the proper pricing and completion of construction projects for defense installations and production facilities.

Few industrial undertakings are as complex as construction. On the basis of experience and involved planning, different groups of skilled craftsmen work in relatively short overlapping relays. The teams and combinations vary with the stage of work. So, for

example, electricians will work for a short time when the structure consists of no more than a frame at the same time as structural steel and carpentry work is in progress. They are then laid off and electrical work requiring similar skills is resumed at a later stage. At that point many of the original electricians have obtained work on other projects and in other locations and different employees with the same training and experience replace them. Even on vast projects such as dams each craft is required for short periods and only the complexity of the operation increases (pp. 22-28, 46, 155, 169). Employers maintain only a skeleton force of executives, engineers, and key foremen between projects and hire the bulk of employees anew for each job.

Work for each craft is available on each project only for short and interrupted periods. Employees therefore circulate among different jobs and employers in order to obtain some continuity of employment. Employer-employee relationships are neither fixed nor durable. These same factors make it necessary for employees to know what their wages and working conditions are to be before hiring on at a particular project.

Labor agreements in this industry are of different types. National and State associations of contractors enter into contracts with international unions and State councils which set conditions and standards of employment. Some such agreements also provide for wage rates, but these terms usually are agreed to at

the State or local level. In many out-of-the-way areas there is usually little construction work, and large projects, particularly for defense installations and plants, are let to contractors from a different part of the country who must procure skilled labor from outside the locality in which the work is to be done. Before employees will commit themselves to work they must know what their earnings will be and, in this highly organized field, they expect to operate under collective-bargaining agreements. Indeed, in such instances, labor organizations are indispensable to the recruiting of skilled and competent craftsmen.

In this industry, it is traditional to have bargaining take place through long periods of the winter and to conclude agreements for one or two years in the early spring before the bulk of construction is begun. Time does not permit collective bargaining after a group of craftsmen begins work.

All of these factors dictate that collective-bargaining agreements in this industry be concluded before the employment relationship is begun. Only in this manner can the economic needs of employers and employees in this industry be met.

Impact of the Labor Management Relations Act Upon the Building and Construction Industry

The National Labor Relations Board did not apply the Wagner Act to this industry (pp. 31, 189; also see *Matter of Brown & Root,* 51 N. L. R. B. 820). After the passage of the Labor Management Relations

Act it was contended that building and construction were essentially intrastate in character, so that as a matter of law they were beyond the reach of the commerce power, and that their effect upon commerce was indirect and insubstantial. These contentions were rejected by the courts (*United Brotherhood of Carpenters & Joiners of America, District Council of Kansas City, Missouri, and Vicinity, A. F. of L., et al. v. Sperry* (C. A. 10, 1948) 170 F (2d) 863, 184 F (2d) 60, cert. den. 341 U. S. 947 (1951)). It was argued in some quarters that the Board, in the exercise of its discretion, should decline to apply the provisions of the amended act in this field. The Board declared that the legislative history, particularly that relating to so-called secondary boycotts, indicated firm congressional intent to regulate labor relations in this industry and that it was therefore without authority to decline jurisdiction (*Matter of Watson's Specialty Store,* 80 N. L. R. B. No. 91; *Matter of Samuel Langer,* 82 N. L. R. B. 1028, enf'd (CA 2, 1950) 181 F (2d) 34).

The Board's assumption of jurisdiction brought into question the validity of collective-bargaining agreements executed before the hiring of any employees. Section 9 (a) of both the Wagner Act and Labor Management Relations Act define exclusive bargaining representatives as those "designated or selected * * * by the majority of the employees in a unit appropriate for such purposes * * *." In applying that provision, in conjunction with section 8 of

both acts, to conventional enterprises with regular and continuously employed workers, the Board had always held that recognition of a union before the hiring of any employees was an unfair labor practice (e. g., *Matter of Chicago Freight Car & Parts Company,* 83 N. L. R. B. 1163).

The General Counsel of the Board attempted to meet this problem, but it was recognized that the normal election procedures were not adaptable to the industry because of its casual, intermittent employer-employee relationship. Plans were laid for holding elections among craftsmen who received substantial employment in a labor-market area. It was felt that such employees would constitute the area labor pool from which all of the contractors in the area hired and hence might be considered their "employer." As such, the group might be considered as an appropriate unit for collective bargaining or election purposes. It was an attractive theory, but there was no certainty that the Board would find it acceptable (pp. 189-190). Acting Board Chairman Reynolds, in a letter to the subcommittee, commented that in both attempted applications of the theory the units involved did not meet the Board's normal criteria for multiemployer units (p. 86).

Two attempts at holding such area pool union security (UA) elections were made. One, for the Detroit area, proved a failure. Another in western Pennsylvania was conducted only after prodigious effort and at the approximate cost of $40,000 or about $15 per ballot. A handful of elections for smaller units were

conducted, but only where specially favorable conditions prevailed (pp. 87-97). In Detroit it had been planned to hold the referendum in a unit composed of craftsmen in five counties comprising the metropolitan area. All of the building-trades unions and all of the employers who recognized any or all of them were to participate. A central problem was to decide upon the basis for determining eligibility to vote so that a representative group of employees would be balloted. It was agreed that all employees working on the day of the election would be eligible. It was estimated that 4,300 job sites employing approximately 40,000 men were involved. The plan was abandoned when 1 association refused to participate, although 25 other associations had endorsed the scheme. It had been difficult for the General Counsel's representatives to persuade the unions to go along. A serious problem was locating and including hundreds of independent contractors in the area. The problem of actually preparing an eligibility list remained unsolved at the time the experiment fell through (pp. 191-193).

Thereafter the General Counsel announced that he was suspending plans for conducting election throughout the building and construction industry (p. 36). He also announced that he was considering a policy for the construction industry of not enforcing the Taft-Hartley limitations upon union security.

The Board commented, in part, as follows:

> Some time ago the General Counsel announced that, because of certain widely recognized diffi-

> culties which flow from the character of employment relations in the building-construction industry, he would not seek to enforce the union-shop provisions of the Taft-Hartley Act there as fully as he would elsewhere. The Board appreciates the General Counsel's persistent efforts to find a solution of these problems, which lie far more within his statutory and delegated jurisdiction than within ours.
>
> Yet we cannot join in so much of the General Counsel's proposed policy as would tend to vary or nullify the plain language of the present statute, no matter how tempting practical considerations might make that course.
>
> * * * * * * *
>
> Assuming that we are to continue to exercise jurisdiction over the building-construction industry, and yet that some of the union-shop provisions of the act cannot be made to work there, it is our duty to report that fact to the Congress, rather than to change the law ourselves by administrative exemption of a single industry (p. 36).

The committee finds that the normal election procedures of the Board have proven unadaptable to this industry because of the short-term, casual employment that is typical to it. The General Counsel's efforts to devise special means, such as the area-wide labor-pool election, for balloting appropriate groups of construction craftsmen, have proven fruitless. We conclude that the obstacles to conducting satisfactory elections in sufficient numbers are formidable, if not insuperable.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 72

A. B. SWINERTON, RICHARD WALBERG AND HOWARD HASSARD, d/b/a SWINERTON AND WALBERG COMPANY, AND JABEZ BURNS & SONS, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 268-279) is reported at 202 F. 2d 511. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 67-75, 27-51) are reported at 94 NLRB 1079.

JURISDICTION

The judgment of the court below was entered on February 17, 1953 (R. 279). The petition for a

writ of certiorari was filed on May 18, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

During the period involved in this case, the National Labor Relations Act permitted an employer and a labor organization to conclude a union-shop agreement, requiring employees to join the labor organization as a condition of employment thirty days after the date of the agreement or the date of employment, whichever was later, provided (1) the labor organization was the representative of the employees as defined in Section 9(a) of the Act and (2) the Board had certified, following an election in accordance with Section 9(e) of the Act, that a majority of employees eligible to vote in the election had voted to authorize such an agreement. (The second of these requirements has since been eliminated, see p. 5, n. 4, and pp. 17-18, 20-21, *infra.*) The question presented is whether, because the election procedures of Section 9 of the Act were not made available to petitioners and other employers and unions in the building and construction industry, the Board was precluded from finding that petitioners had violated Section 8(a)(3) and (1) of the Act by making union membership or clearance a condition of employment, when no election or certification could have rendered lawful these practices found by the Board.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in Appendix A to the petition, as supplemented by the Appendix to this brief, *infra,* pp. 17-21.

STATEMENT

Following the usual proceedings under the Act, the court below approved the Board's findings that petitioners had violated Section 8(a)(3) and (1) of the Act by refusing to employ certain members of the International Association of Machinists (herein called the IAM) because they were not members of, or referred by, Millwrights Local 102, United Brotherhood of Carpenters & Joiners of America (herein called Local 102 or Carpenters). Although petitioners reserve for future consideration, in the event the petition is granted, the question whether the Board's findings are supported by substantial evidence on the record as a whole, they presently challenge the decision below only insofar as it overruled their contention that the Board should refrain from enforcing the unfair labor practice provisions of the Act against employers in the construction industry.

A. The Board's Decision

1. *Petitioners' business*

Petitioner Swinerton and Walberg (hereinafter called Swinerton) is a general contractor in the building and construction business, operating in

California and other states. Petitioner Jabez Burns & Sons, Inc. (hereinafter called Burns) is a manufacturer and installer of food processing equipment with its offices and plant in New York. In the fall of 1949, when this case arose, Swinerton was engaged as general contractor in the construction of a $2,000,000 processing plant for the General Foods company at San Leandro, Alameda County, California; Burns, as a subcontractor under Swinerton, was engaged at the same project in installing certain coffee processing machinery of its own manufacture. (R. 29-31; 14-16, 84-88.)[1] In connection with their operations both petitioners purchase substantial quantities of supplies and materials which are shipped to them across state lines (*ibid.*). The Board, in a finding which is not challenged here, determined that each is engaged in commerce within the meaning of the Act (R. 31).

2. *Petitioners' unfair labor practices*

Petitioner Swinerton is a member of the Central California Chapter of the Associated General Contractors of America, Inc. (hereinafter called AGC). In 1948 AGC, on behalf of its members and their subcontractors, and the Bay Counties District Council of Carpenters, A.F.L. (hereinafter called Carpenters' Council), on behalf of its member unions (including Local 102), executed a year-to-year contract covering the employment of carpenters,

[1] Whenever a semicolon appears in a series of record references, the references preceding the semicolon are to Board findings; succeeding references are to the supporting evidence.

including "millwrights,"[2] on construction jobs in the San Francisco area. (R. 40; 139, 137, 145-146, 200-201.) The contract contained, *inter alia,* the following "Hiring" clause (R. 139):

> There shall be no limitation of the employer as to whom he shall employ or discharge, except that any employee doing carpenters' work shall be, or within 30 days shall become, a member of a Carpenters Union affiliated with [the Carpenters' Council] * * *.

A succeeding clause provided, however, that this union-shop agreement would not become effective until the Carpenters' Council obtained Board certifications under Section 9(c) and (e)[3] of the Act, showing that it was both (1) the statutory bargaining agent of the employees covered by the contract, and (2) authorized to make a union-shop contract covering those employees, as then required by the proviso to Section 8(a)(3) (R. 139-140).[4]

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[2] "Millwrights" are mechanics who perform the work of machinery installation. Both the IAM and the Carpenters' International Brotherhood have long claimed "jurisdiction" over this work.

[3] The contract mistakenly cites Section 9 (d) instead of 9 (e) (R. 139).

[4] At the time here in question the proviso to Section 8 (a) (3) permitted employers to make agreements with labor organizations requiring "as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to

The Carpenters' Council never obtained the certifications on which the aforesaid union-shop provision of its contract was conditioned. At the hearing in the instant case petitioners offered to prove that the failure to obtain the required certifications was due solely to the circumstance that although the AGC requested the Board's then General Counsel to conduct appropriate consent elections under Section 9 of the Act with respect to employees engaged in the construction industry in the California area, the General Counsel declined to do so because his experience with similar elections in the construction industry had for a variety of reasons established that they were not feasible (R. 141-160). The trial examiner, with the subsequent approval of the Board, rejected the offer (R. 67, 152). The trial examiner and the Board, basing their conclusion on findings of fact detailed below, pointed out that "The essential and determinative fact is that despite [the union security] provision in the contract, in practice [petitioners] maintained a closed shop, employing only members of unions affiliated with the [Carpenters' Council]" (R. 40).

On October 20, 1949, Amos W. Doane, an IAM representative, visited the General Foods construction site for the purpose of making a job survey for his union (R. 31-32; 91). At that time Doane questioned Arnold Thomas, Swinerton's general

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vote in such election have voted to authorize such labor organization to make such an agreement."

The second of these requirements was subsequently eliminated, and Section 9 (e) was correspondingly amended, 65 Stat. 601, effective October 22, 1951. See Appendix, *infra*, pp. 20-21.

superintendent, about the possibility of placing IAM machinists on the job as machinery installers (R. 32, 68; 91-92). Thomas replied that since Swinerton was a member of the AGC, all applicants had to be cleared by a "Building Trades Union" (R. 32; 93), which meant that they "would first have to get clearance from the Millwrights Union [Local 102]" (R. 32, 69; 93).

Several days later, on October 24, 1949, Doane returned to the job site and saw Burns' foreman, John Turk, and subforeman, Aliso Sabrowske (R. 68, 69, 32; 94). In answer to Doane's inquiry as to the possibility of employing IAM members, Turk and Sabrowske said that petitioner Burns had an agreement with Carpenters requiring that only millwrights with Carpenters' clearance be employed on the job (R. 68, 69, 32; 94-95, 97).

In October and November 1949, eight IAM members, seeking work, invoked their union's assistance in locating suitable jobs. The seven who testified at the subsequent Board hearing are all qualified machinists with five or more years' experience in machinery installation work (R. 35; 100, 105, 108-109, 112, 116, 124-125, 131).[5] Six of them were unemployed at the time of the interviews herein described (R. 33, 34; 103, 107, 115, 120, 130, 131). The seventh, Callaway, was working on the swing shift in a paper factory, earning only $1.42 per hour, and he desired more remunerative work in

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[5] The eighth, Gilbert, did not appear at the hearing. According to witness Gustaveson, he was, like the others, an IAM man who had gone to the Machinists' Hall in quest of employment (R. 125, 127-128).

his own trade (R. 33-34; 110-111).[6] At the suggestion of IAM officers, these men went to the General Foods project in quest of jobs on several dates in late October and mid-November 1949 (R. 32-37; 107, 110, 115, 119, 127, 134).

Two of them, Nelson and Eakle, spoke to Swinerton's general superintendent, Thomas, on or about October 25 (R. 33; 100, 105). Both men stated that they were looking for work on machinery installation, and then disclosed, in answer to Thomas' question, that they were IAM members (R. 37; 101, 106). Thereupon, Thomas told them that Swinerton could not hire them because it was "all tied up with the Millwrights Union" (R. 37-38; 101, 106). He declined Eakle's request for an application blank, and explained to Nelson that (R. 101):

> Swinerton-Walberg were members of the Associated General Contractors, that because of contractual obligations with the Building Trades Department of the American Federation of Labor, they could only use Millwrights on that work.

Two of the other machinists against whom petitioners were found to have discriminated, Callaway and Stake, accompanied by a third man who is not involved in this litigation, approached Thomas at the project site on or about November 15 (R. 33; 109, 112). Callaway, speaking for himself and his two companions, asked Thomas if Swinerton was "doing any installing of machinery," and when Thomas replied in the affirmative, inquired what

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[6] Respondents paid their millwrights $2.35 per hour (R. 146, 183).

craft was doing the work, and whether there was any work for "machinists." Thomas responded with a "big wink," saying, "I'm wise to you guys," and walked away (R. 33, 38; 110, 113).

The four other machinists applied to Burns on or about November 14 (R. 34; 116-117, 124, 126, 131). Together, these men went to the project, located Burns' millwright foreman, Aliso Sabrowske, and asked him whether he was hiring any men (R. 34; 118, 121, 122, 126, 128, 132). Sabrowske stated that "in a couple of days," when certain cement dried, he would be hiring millwrights (R. 128), and asked them whether they belonged to the Carpenters. When they said they did not, Sabrowske told them they would have to "clear" through the Carpenters (R. 38; 118, 123, 126, 130).

None of the IAM men thereafter returned to the General Foods project (R. 43). Two of them, however, went to the Carpenters' office immediately after they had seen Sabrowske. They asked an unidentified man at the desk for "working permits" and were told that the Carpenters did not issue such permits—that they would "have to sit down and take an examination and pay fifty dollars" (R. 34-35; 133).

Although neither petitioner had millwright jobs immediately available on the dates of the aforesaid applications, each hired more than four mechanics to fill such positions within the next few weeks (R. 42; 172-183, 201, 246, 247). In Swinerton's case the hiring was done by a millwright foreman named Curry who was himself a member (later

business agent) of Local 102 (R. 39; 201-202, 211-212, 217-218). With the possible exception of one or two men who belonged to the Ironmakers' union, an A.F.L. Building Trades affiliate (R. 203-204), Swinerton engaged no men for machinery installation work who to its knowledge were not members of Local 102 or one of its affiliates in the Carpenters' Brotherhood (R. 39; 204-205, 211, 206, 215-216). Burns' smaller crew of millwrights was composed exclusively of members of Local 102, about half of them recruited by subforeman Sabrowske who was also a Local 102 member (R. 38; 198, 103).

3. *The Board's conclusions and order*

Upon the foregoing facts, the Board found that each of the petitioners had discriminated against the IAM men who applied to it for work by refusing to entertain their applications or otherwise permit them to compete for jobs on equal terms with members of Local 102; that this discrimination had the effect of denying employment to the applicants as of the time when millwright jobs became available; and that petitioners thereby violated Section 8 (a) (3) and (1) of the Act (R. 68-70, 43-44).

The Board ordered each petitioner to cease and desist from the unfair labor practices found, to make whole the applicants to whom it had denied employment, and to post appropriate notices of its compliance with the order (R. 70-75).

B. The Decision of the Court Below

The court below affirmed the Board's findings that petitioners had violated Section 8 (a) (1) and

(3) of the Act, and enforced the Board's order in full (R. 268-287). The court rejected petitioners' contention that it would not effectuate the policies of the Act for the Board in the circumstances present here to assert jurisdiction over, and prosecute unfair labor charges against, members of the building and construction industry like petitioners. The court stated that "Whether the Board should assume jurisdiction in respect to a particular industry is in the absence of abuse of discretion exclusively for the Board" and that "prosecution of unfair labor practices of the type herein involved is [not] beyond the scope of the Board's discretion merely because the practices take place within the building and construction industry" (R. 278). The court also rejected petitioners' contention that they should not have been held accountable for the commission of unfair labor practices prohibited by Section 8 of the Act because the election procedures of Section 9 had not been made available to employers and labor organizations in the building and construction industry. The court observed that the problem created by the difficulty of conducting representation elections within the building and construction industry "is of course for Congress rather than the courts" (*ibid.*). Finally, the court concluded that "Even if such representation elections were held and particular unions certified on the basis of the election results, the practice [pursued by petitioners] of requiring, as a condition to original employment, membership in or clearance from a union which discriminates in

favor of its own members would still violate the Act" (R. 279).

ARGUMENT

The heart of petitioners' case is that since the "inability of the Board to devise workable procedures for the determination of the representative status of building trades unions" (Pet. 29) has resulted and will result in the denial of the benefits and protection of the representation procedures of the Act to employers and unions in the construction industry,[7] the enforcement of the unfair labor practice provisions of Section 8 of the Act against such

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[7] Petitioners' statement that the benefits and protection of the representation procedures of the Act are unavailable to all employers and unions in this industry is not accurate. To be sure, the casual and intermittent employer-employee relationship prevailing in the construction industry has made the holding of elections as provided in Section 9 of the Act difficult. In 1948 the Board's General Counsel sought to meet these difficulties by projecting a series of "area-wide, industry-wide" elections covering so-called "area-pool" bargaining units, based upon the consent of all interested parties (cf. Section 9(c)(4) of the Act), but various difficulties encountered in this connection led the General Counsel to abandon these plans (see Pet. 9, App. C, pp. xxi-xxviii). Both before and since that project was abandoned, however, the Board and the General Counsel have succeeded in conducting elections under Section 9 in cases involving construction employees in shops and on large projects of substantial duration; and the Board's policy has been to direct such elections in cases coming before it for decision where the employment in the unit is sufficiently stable to permit an election to be held therein. See *Plumbing Contractors of Baltimore, Md., Inc.*, 93 NLRB 1081, 1085-1086; also the September 1951 report of the Acting Chairman of the Board which is included in the Hearings on S. 1973 before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess., p. 85 ff. As the Board there explained (*id.*, p. 86), it "deal[s] with the problem [of applying the representation provisions of the Act to the construction industry] on a case-by-case basis."

employers and unions constitutes an abuse of discretion by the Board and a denial of due process in contravention of the Fifth Amendment. The short answer to this broad-gauged contention is, as the court below pointed out, that "Even if such representation elections were held and particular unions certified on the basis of the election results, the practice [adopted by petitioners in the instant case] of requiring, *as a condition to original employment*, membership in or clearance from a union which discriminates in favor of its own members would still violate the Act" (italics supplied) (R. 279).

The unfair labor practice for which petitioners were held accountable was that they had conditioned the hiring of eight applicants for millwright jobs upon membership in or clearance from the Carpenters.[8] Such a discriminatory hiring policy is, as petitioners do not deny, violative of Section 8(a)(3) and (1) of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 187; *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686, 688-690 (C.A. 2), certiorari denied, 338 U.S. 954; *National Labor Relations Board* v. *Jarka Corporation, et al.*, 198 F. 2d 618, 619-620 (C.A. 3); *National Labor Relations Board* v. *Daniel Hamm Drayage Co.*, 185 F. 2d 1020 (C.A. 5), enforcing 84 NLRB 458; *National Labor Relations Board* v. *Whittenberg Con-*

[8] As the court below noted, the alternative requirement of referral or clearance by the Carpenters was tantamount to a requirement of membership in that union (R. 273-274).

struction Co., 200 F. 2d 157 (C.A. 6); *National Labor Relations Board* v. *Local 743, United Brotherhood of Carpenters*, 202 F. 2d 516, 518 (C.A. 9). And there is nothing in the union-security proviso to Section 8(a)(3), or in Section 9 or any other provision of the Act, which permits an employer or a union to obtain immunity for such a discriminatory hiring practice through a Board election

The union-security proviso to Section 8(a)(3) in effect when the unfair labor practices found here were committed permits an employer to make an agreement with a labor organization requiring as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of the agreement, whichever is later, provided (1) the labor organization is the representative of the employees as defined in Section 9(a), and (2) a majority of the employees have, in a Board-conducted election as provided in Section 9(e) of the Act, authorized the union to enter into such an agreement.[9] Necessarily undisputed by petitioners is the plain and decisive fact that the proviso does not permit an employment policy or practice conditioning *hiring* upon membership in a union. Hence, even if the election procedures of the Act had been available and all the statutory conditions relating to union-security agreements had been satisfied, petitioners could not have pursued as they did an employment policy conditioning hiring of employees

[9] As noted above, pp. 5-6, n. 4, the second requirement is no longer in effect.

for millwright jobs upon membership in the Carpenters. And, by the same token, even if the AGC contract (*supra*, pp. 4-6), under color of which petitioners' supervisors purported to act in discriminating against the job applicants, could have been validated by resort to the election procedures of the Act, the contract, as petitioners do not deny, would have afforded no defense to the discrimination found here.[10] In these circumstances the decision of the court below is clearly correct and there is no warrant for consideration of the broad question presented by petitioners—whether employers and unions in the construction and building industry should be excused from compliance with the unfair labor practice provisions of the Act because of denial of the "benefits and protection of the representation provisions of the Act."

Petitioners frankly concede (Pet. 40) that "They seek a decision which, in its broadest aspect, would stay the enforcement of the unfair labor practice provisions of the Act, insofar as the building and construction industry is concerned, until the Board has devised workable procedures and principles for applying the representation provisions of the Act to the industry." In support of this request petitioners cite various hardships

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[10] The contract in terms required union membership *thirty days after hiring*—not, as petitioners were found in fact to have required, membership or union clearance before being employed at all. Accordingly, had the necessary election procedures been completed, the contract would have been valid on its face, though ineffective, of course, to legalize the requirement petitioners actually imposed.

which employers and labor organizations in the construction industry have incurred or will incur from the enforcement of the unfair labor practice provisions of the Act as long as they cannot make effective use of the representation procedures. What we have said above establishes, we think, that the instant case presents no occasion for resolving this issue. Moreover, as the court below correctly observed (R. 278), "the difficulty of conducting representation elections in suitable bargaining units within the building and the construction industry * * *" and the effect of these difficulties on enforcement of the Act is essentially "for Congress rather than the courts."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1953

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), supplementing those which appear in Appendix A of the petition for certiorari, include the following:

Sec. 8.(a) It shall be an unfair labor practice for an employer—

* * * * *

(3) [11] by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9

[11] See 65 Stat. 601, *infra*, pp. 20-21, for changes made by the amendment of October 22, 1951.

(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Sec. 9 * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representa-

tive, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

(e)(1) [12] Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed

[12] See 65 Stat. 601, *infra*, p. 21, for changes made by the amendment of October 22, 1951.

to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

Amendment of October 22, 1951, 65 Stat. 601:

* * * * *

(b) Subsection (a) (3) of section 8 of said act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of

such labor organization to make such an agreement:"

(c) Section 9 (e) of such Act is amended by striking out all of subsections (1) and (2) and inserting in lieu thereof the following: "(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organizations and to the employer." Renumber subsection "(3)" as "(2)."

* * * * *

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 72

A. B. SWINERTON, RICHARD WALBERG and HOWARD HASSARD, d/b/a Swinerton and Walberg Company, and JABEZ BURNS & SONS, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

In its brief in opposition to the petition for certiorari, the National Labor Relations Board concedes that the representation election provisions of the Na-

tional Labor Relations Act have not been made generally available to employers and unions in the building and construction industry. The Board's sole argument against the granting of certiorari is that "even if the election procedures of the Act had been available and all the statutory conditions relating to union-security agreements had been satisfied, petitioners could not have pursued as they did an employment policy conditioning hiring of employees for millwright jobs upon membership in the Carpenters" (Brief, pp. 14-15).

In advancing this argument the Board is playing a game of cat and mouse with petitioners, and with the entire building and construction industry.

As petitioners offered to prove in this case (R. 146, 156), Robert N. Denham, then General Counsel of the Board, proposed on December 19, 1949, that he and the Board announce an enforcement policy under which employers and unions in the building and construction industry would have been given assurance that if they conformed their union-security agreements and practices to the 30-day requirement of the Act, they would be protected against unfair labor practice charges notwithstanding the absence of elections.

General Counsel Denham proposed the following (R. 159-160):

> "In view of the foregoing, the National Labor Relations Board and the General Counsel of the Board, in processing unfair labor practice charges under the Act, based upon union security con-

tracts, arrangements, or practices in the portions of the organized building and construction industry for which no administrative machinery for conducting union shop elections has been established;

(1) Will deem the union shop authorization requirements of Section 8(a)(3) and 9(e) to have been met, despite the fact that no election may have been held, until such time as administrative machinery has been established and made available to the public;

(2) Will compute the 30-day provisions of Section 8(a)(3) as satisfied by a showing of total employment for 30 days by any employer or employers, either singly or in the aggregate, in the unit covered by the collecting bargaining contract containing the union security provisions; and

(3) Will process in normal fashion all cases which, despite the considerations set forth in paragraphs (1) and (2) above, involve violations of any of the unfair labor practice sections of the Act.

This policy will apply only to those situations within the industry where, because of the difficulties heretofore described, it is administratively impracticable to conduct an election pursuant to Section 9(e) of the Act, and where the union has fully complied with the filing requirements of Section 9 (f), (g) and (h) of the Act. It does not apply to those situations where employment is sufficiently stable to permit the conduct of elections. Nor does it apply to that type of conduct with respect to union security which is outside the allowable area defined in the proviso to Section

8(a)(3) of the Act and which would be within the prohibition of Sections 8(a)(3) and 8(b)(2) notwithstanding actual union security authorization."

On June 6, 1950, the Board, in a public statement of policy on the building and construction industry, rejected the General Counsel's proposal, saying in part:

> "Assuming that we are to continue to exercise jurisdiction over the building construction industry, and yet that some of the union shop provisions of the Act cannot be made to work there, it is our duty to report that fact to the Congress, rather than to change the law ourselves by administrative exemption of a single industry.
>
> Of course, so long as the General Counsel thinks it fairest and best to exercise his exclusive discretion by declining to issue complaints of unfair labor practice if employees are discharged pursuant to an unauthorized union-shop contract, the Board could not, if it would, conduct a hearing or find a violation of law. *If and when, however, any such case reaches the Board Members for decision, we will have no choice but to enforce the law as written."*[1]

The Board's statement of policy of June 6, 1950, was reprinted in full as Appendix C to its brief before the Court of Appeals in this case. In so far as petitioners or any other employers or unions in the building and construction industry are advised, such

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[1]Throughout this brief, emphasis is added unless otherwise noted.

statement continues to reflect the inflexible policy which is being and will be enforced against the industry. Thus, even if the effectiveness of the union security provision of the applicable collective bargaining agreement (R. 139-140) had not been conditioned upon certification of the Union by the Board and even if petitioners had conformed their hiring practices to the requirements of that union-security provision, they would have been liable to punishment by the Board for unfair labor practices.

The reported decisions of the Board reflect the indisputable fact that the Board is enforcing to the hilt the unfair labor practice provisions of the Act against employers and unions in the building and construction industry at the same time that it is withholding the benefits and protection of the representation provisions of the Act. For the reasons set forth in the petition, we contend that such an enforcement policy defeats rather than effectuates the policies of the Act, since it disrupts rather than stabilizes labor relations in the industry.

We do not understand the Board as denying that its policy is disrupting labor relations in the building and construction industry. In its statement of policy it says that it must "enforce the law as written". In its brief before this Court it adopts as its own the observation of the Court of Appeals that the "effect of these difficulties on enforcement of the Act is essentially 'for Congress rather than the courts'" (Brief, p. 16). As we read the Board's brief, it concedes that

its present policy with relation to the building and construction industry is not achieving the primary objective of the Act, namely, stability of labor-management relations, but it contends that neither it nor the Courts can do anything about the situation.

It is this premise that we challenge. As we pointed out in the petition (pp. 34-38), the principal guide which Congress established for the Board in its administration of the Act was that such administration "effectuate the policies of the Act". Pursuant to the discretion granted by this directive the Board, for a period of over ten years, declined to enforce *any* of the provisions of the Act in so far as the building and construction industry was concerned. In 1948, as a result of the enactment of the Labor Management Relations Act of 1947, it determined to exercise its conceded jurisdiction over the industry. It then encountered difficulties in performing with respect to the industry one of its two principal functions under the Act, namely, that of certifying collective bargaining representatives for appropriate bargaining units. Instead of adjusting its administration of the Act to avoid the disruption in labor relations which has flowed inevitably from these difficulties, it has asserted and still asserts that the Act gives it no discretion to withhold enforcement of the unfair labor practice provisions until the difficulties with the representation provisions have been solved. It is apparent that unless and until this Court intervenes with a clear delineation of the Board's discretion and duties

with relation to this important industry, the Board will continue blindly to snipe and tear at the long-established labor-management relations in the industry until Congress affords relief, or until those relations, which have long been an exemplar of peace and stability, have been destroyed.

The inequity of the Board's policy is so apparent that the Courts of Appeals, in other cases decided subsequently to the decision in this case, have sought vainly for a satisfactory answer to our contention short of the one which we ask this Court to give.

In *National Labor Relations Board v. Reed* (C.C.A. 9th, June 22, 1953) ___ F. (2d) ___, 23 C.C.H. Labor Cases, par. 67,457, the respondent building subcontractor urged that it was an abuse of discretion to penalize him for yielding to the pressure of a building trades union for action designed to maintain union discipline, where the parties had been foreclosed by the ineffectiveness of the representation and union-shop provisions of the Act from entering into and enforcing a valid union-security agreement. The Court of Appeals first answered this argument by saying that there was no inequity "for the Act does not provide for exemptions to violations of Sections 8(a)(1) or 7". It subsequently realized that the Act *does* provide an exception to the prohibitions of Section 7 which validates action pursuant to an "agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)," and on August 13, 1953, it amended its opinion

to state that there was no inequity in the case for the reason that since the charging party was a dues-paying member of the respondent Union "the Union already had all the benefits it could obtain under the exception to Section 7". Obviously, such an answer would have no validity in the usual case where the party charging discrimination is not a member of the union or is delinquent in his dues.

In *Eichleay Corp. v. National Labor Relations Board* (C.C.A. 3rd, August 26, 1953), ... F. (2d) ....., 24 C.C.H. Labor Cases, par. 67,802, the Court had before it a petition to set aside the order of the Board in *Eichleay Corporation* (1953), 102 N.L.R.B. No. 63, cited at pages 17 and 18 of the petition in this case. Pursuant to charges filed by the International Association of Machinists, the Board had ordered the Eichleay Corporation to cease and desist from entering into and enforcing an oral agreement or understanding conditioning the hire and tenure of employment of millwrights upon membership in the Carpenters Union.

The Court acknowledged that the failure of the Board to devise workable representation procedures for the building and construction industry had, in practical effect, outlawed the union-shop insofar as that industry was concerned. Nevertheless, it rejected the argument that enforcement of the Board's order would not effectuate the policies of the Act, since in its opinion the Board *must* issue a cease and desist order once it has determined that a prohibited prac-

tice exists and the Court "must say to Eichleay, as other Courts have said when faced with the problem, that if it is aggrieved its remedy lies not in the Courts but in Congress".

Petitioners respectfully submit that in both the *Reed* and *Eichleay* cases, and in the case now before this Court, the Courts of Appeals have missed the basic point of the argument against permitting the Board to enforce the unfair labor practice provisions of the Act while it is withholding the benefits and protection of the representation provisions of the Act. The argument *assumes* that the employer or union involved in any particular case has been guilty of conduct constituting an unfair labor practice. Petitioners claim that in most such cases, and certainly in the case now before this Court (Petition, pp. 20-21), the employers have become involved in questionable practices solely because of the absence of the methods and procedures which Congress intended should be available for the protection of the legitimate union-security rights of the building trades unions. The enforcement of the unfair labor practice provisions of the Act under these circumstances defeats rather than effectuates the will of Congress, and it is the right and duty of the Courts to intervene in the manner urged in the petition.

It is inconceivable that an Act which permitted the Board to withhold application of any of its provisions to the building and construction industry for a period in excess of ten years does not have suffi-

cient flexibility to permit the practical adjustment of its procedures to the realities of labor-management relations in that industry. The remarkably stable relations which have existed in the industry have been hammered out by employers and unions over a period which commenced many years before the enactment of the original Wagner Act. There is nothing in the Act which in terms prevents the Board from accepting these relationships as it finds them and certifying as appropriate, without elections, the bargaining units which employers and unions have forged over the years and consolidated by written collective bargaining agreements.

Petitioners believe that if and when the Board is called before the bar of this Court to give an account of its stewardship, and if and when it is told by this Court, as it should be told, that the Act requires that it adjust its administration to effectuate the policy of stabilizing labor-management relations in the building and construction industry, it can and will devise workable procedures to give employers and unions in the industry the benefit and protection of the representation provisions of the Act.

The Board and the Courts of Appeal have made abundantly clear that only this Court can settle the important question as to whether the Courts have the authority to protect employers and unions in the building and construction industry against administrative action which all who have considered the matter—the Senate Labor Committee, the Board itself and

the Courts—concede is disruptive of labor-management relations in the industry. This question would have vital significance even if Congressional relief for the industry within the near future were certain, since it is important to the due administration of the National Labor Relations Act, and of all other regulatory acts, to reaffirm the principle that the administrator must at all times conform his procedures to the basic guides and objectives laid down by Congress. The question derives even greater significance and urgency from recent events, of common knowledge, which indicate that amendment of the Act is so deeply involved in practical political considerations that legislative relief for a single industry may be long deferred.

For the reasons set forth in the petition and in this reply brief, petitioners respectfully submit that this Court should grant certiorari in order that the question may be settled at the earliest possible date.

Dated, San Francisco, California,
September 28, 1953.

Respectfully submitted,
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Counsel for Petitioners.

JOHNSON & STANTON,
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HAROLD B. WILLEY, CL

In The

Supreme Court of the United States

October Term, 1953

No. 72

A. B. Swinerton, Richard Walberg and Howard Hassard, Doing Business as Swinerton and Walberg Company, and James Burns & Sons, Inc.,
Petitioners,

vs.

National Labor Relations Board,
Respondent.

MEMORANDUM OF BUILDING AND CONSTRUCTION TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR AS AMICUS CURIAE

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Respondent.

MEMORANDUM OF BUILDING AND CONSTRUCTION TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR AS AMICUS CURIAE URGING GRANT OF CERTIORARI

Sec. 8(a) of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. Supp. V 151, et seq.) outlaws the closed shop but allows a union, after certification, to require employees to become members of it. The question presented in the present case is whether where there is no possibility of certification (because elections are admittedly impracticable in the building trades industry) an unfair labor practice is actionable which certification would undoubtedly avoid.

The Building Trades Department of the A. F. of L. is composed of more than 3,000,000 construction workers. The court below and the Congress[1] have admitted the inability of the NLRB, due to the short-term transitory nature of employment in the building trades industry, to hold representation elections to designate a collective bargaining agency. Such an election results in a Board certification which gives the union the exclusive privilege to negotiate a union shop agreement. Such an agreement has obvious advantages to the union; it is likewise beneficial to the contractor in that it guarantees him a continuous supply of skilled labor.

The inability of the NLRB to hold an election subjects the building trades unions to the possible abuses which the present case illustrates. Had there been the power of election the unfair labor practice herein would never have occurred; if after certification positions became available the applicant would have been accepted subject to its joining a union within the 30-day period. It is no answer to this argument for the Government to contend (Gov. Br. pp. 12-13) that even with certification the union could not do what it did in the present case. The point is that the denial of the right of certification to the building trades unions lays those unions and their employees open to harassment from other unions against which they are bound to protect themselves. Thus the one-sided operation produces rather than restrains industrial strife.

Construed as it was below, the Act is entirely unilateral so far as the building trades are concerned; this immense group is subjected to all the penalties of the Act without possibility of receiving any of its advantages. Indeed the Act thus construed denies such unions the right to function as unions at all; the most ordinary and usual union activities are proscribed. The lack of certification

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[1] Sen. Rep. No. 1509, 82nd Congress, 2nd Session, pp. 4-6.

not only permits, it invites predatory unions to come in and upset long-standing contractual arrangements. The long-term effect of inability to secure certification is to discourage contractors from making any agreements at all with building trades unions, who thus are thrown on their own resources for self-protection. Such a situation militates against the prime purposes of the Act and actually creates industrial unrest.

Under these circumstances it may be seriously questioned whether the Act does not deprive the building trades unions of their rights of contract and of property under the Fifth Amendment; at least they have been placed at a gross disparity with respect to other unions. It may, however, be unnecessary for this Court to examine the validity of the Act, in this posture. The alternative solution is to inquire into the propriety of the NLRB's assertion of jurisdiction in this type of case. Whether to take jurisdiction is ordinarily a question solely for the Board;[1] however, in the present case the net result is a gross abuse, destructive of the very object of the Act itself. No rule of law compels a governmental board to sustain a so-called private right at the expense of a great public wrong. (*Cf. U. S. ex rel. Greathouse* v. *Dern*, 289 U.S. 352).

The building trades unions, three million strong, are traditionally the most conservative and stable element in American labor. They merit something better than a one-sided application of a statute, which exposes them to raids from all quarters. We disagree with the court below that this is a matter for future legislation; our belief is that any such holding as the present is contrary to the admitted object of the Act; certainly the Board's action is unnecessarily discriminatory and uncalled for.

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[1] Except in the event of an abuse of discretion, *NLRB* v. *Atkinson Co.*, 195 F. (2) 141; *Haleston Drug Stores, Inc.* v. *NLRB*, 187 F. (2) 418.

We therefore urge the issuance of the writ to review the substantial questions of unilateral application of the Act herein presented.

Respectfully submitted,

BUILDING AND CONSTRUCTION TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR

By RICHARD J. GRAY
President

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IN THE

Supreme Court of the United States

October Term, 1953
No. 72

A. B. SWINERTON, RICHARD WALBERG and HOWARD HASSARD, Doing Business as SWINERTON AND WALBERG COMPANY, and JABEZ BURNS & SONS, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Amicus Curiae Brief in Support of Petition for a Writ of Certiorari.

Filed on Behalf of National Constructors Association.

To the Honorable Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The undersigned appears herein as *amicus curiae* and submits the within Brief in support of the Petition for a writ of certiorari filed by petitioners above named. Counsel appears on behalf of the National Constructors Association, the members of which are listed in Appendix "A." Consent to the filing of such Brief has been extended by petitioner and by the Acting Solicitor General of the United States.

Opinions Below.

The Decision and order of the National Labor Relations Board [R. 67-75] is reported in 94 NLRB 1079. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 268-279] is reported in 202 F. 2d 511.

Jurisdiction.

The decree of the United States Court of Appeals was entered on February 17, 1953 [R. 263]. The jurisdiction of this Court has been invoked by petitioner under 28 U. S. C., Section 1254(1), and 29 U. S. C. (Supp. 111), Section 160(e).

Questions Presented.

1. Whether it effectuates the policies of the National Labor Relations Act to prosecute unfair labor practice charges against employers in the building and construction industry at a time when, for over five years, employers and unions in such industry have been denied the benefits and protection of the representation provisions of the Act.

2. Whether the enforcement of an order of the National Labor Relations Board against employers in the building and construction industry based upon unfair labor practice charges filed by the International Association of Machinists in furtherance of its jurisdictional claims constitutes a denial of due process of law in contravention of the Fifth Amendment, where for over five years employers and unions in such industry have been denied the benefits and protection of the representation provisions of the National Labor Relations Act.

Statute Involved.

The statute involved is the National Labor Relations Act, 29 U. S. C., Section 151 *et seq.*, as amended by the Labor Management Relations Act, 1947, 29 U. S. C., Section 141 *et seq.* (hereinafter referred to as the "Act"). The pertinent provisions of the Act are printed in Appendix "A," pages i-viii of the Petition for a Writ of Certiorari.

I.

The Instant Litigation Presents a Typical Example of Numerous Proceedings Wherein the Same Union Has Utilized the Provisions of the National Labor Relations Act as a Sword Instead of a Shield, Contrary to the Intent of Congress.

A. The Association's Interest.

The National Constructors Association is a group of engineering and construction firms which are engaged, upon a nation-wide basis, in the designing and building of industrial plants and facilities, primarily in the field of oil refineries, steel plants and chemical plants. Member companies are currently engaged in industrial construction projects in forty of the forty-eight states. At various times since the enactment of the National Labor Relations Act, the total field employment by member companies of building trades mechanics and laborers has reached in excess of 100,000, inclusive of those employed by subcontractors. The work volume of member companies in terms of projects currently under way or under contract for later construction totals the sum of two billion dollars. In addition to its engineering and construction services to large and important segments of American

industry, members of the Association also serve some of the major departments of the Federal government, including the Atomic Energy Commission, the Army Corps of Engineers, the Army Chemical Corps, the Army Ordnance Department, the Department of the Navy and General Services Administration. Many of these projects are secret in nature and are directly involved with national security.

The Association has received some prominence in recent years for its endeavors to achieve stability in labor relations in the construction industry (149 Engineering News Record, No. 19, p. 117, 11/6/52). The stature of the Association and the eminence of its personnel in the industry is further indicated by the appointment of its current President, Mr. John J. O'Donnell, as a member of President Eisenhower's Labor Management Advisory Committee headed by the Secretary of Labor. The Association and its members, therefore, have a real and significant interest in the interpretation and application of the National Labor Relations Act, particularly as the same affects the building and construction industry.

The construction projects of the member companies are in most instances of such magnitude as to eliminate any question as to the coverage of the work under the present jurisdictional standards of the National Labor Relations Board in administering the Act. Often, such a project not only represents the largest single enterprise in the immediate area, but also involves employment of a substantial majority of building tradesmen resident in that area. For this reason, the labor practices and policies of the member company exert dominant, though sometimes temporary, influence upon the construction industry in the area.

In one important respect, the Association is unique. This uniqueness stems from the fact that member companies not only serve as *general contractors,* employing such building tradesmen as carpenters, bricklayers and laborers, but also as *specialty contractors,* employing directly such trades as electricians, pipefitters, millwrights and boiler-makers. *The Association is, therefore, the only national group which has interest covering all aspects of the construction industry from the standpoint of employment and labor relations.*

B. Relationship of the Instant Litigation to the Operations of Members of the National Construction Association.

The undersigned, as *amicus curiae* herein, has been requested by the Association to point out to the Court the representative nature of this type of litigation and to emphasize that similar administrative proceedings and judicial holdings are by no means isolated or occasional. The brief of petitioner herein has listed representative instances of virtually identical proceedings which have been instigated by the International Association of Machinists against other general contractors, including members of this organization. Supplementing such list there are set forth in Appendix "B" hereto, additional instances of proceedings before the Board involving the same issue contained in the instant case.

Disputes of this type plague and harass the construction industry. They appear to represent a deliberate endeavor upon the part of the Machinists Union to capitalize upon the one-sided administration and application of the Act in this field of industry. The processing of such cases by the Union commenced while the office

of the NLRB General Counsel was wrestling with the many perplexing problems attendant upon the holding of representation elections in this fluid and changeable type of employment situation. The institution of charges and complaints increased as it became apparent that the problem was administratively impracticable and incapable of solution. A comparison, in this industry, of the number of unfair labor practice cases of this type since the 1947 amendments to the Act with the negligible number of representation cases since that date bears mute testimony to the one-sided application of the law.

The instant litigation is truly representative of this type of administrative and judicial proceeding. *Amicus curiae* wishes to stress the fact that all contractors are continually beset by the threat of such actions through enforcement of the unfair labor practice sections of the Act while they are at the same time denied the use of the Act's procedural provisions for the determination of representation questions. The presentation of this issue to the Supreme Court presents an opportunity for judicial rectification of an administrative anomaly. *Amicus curiae,* on behalf of the National Constructors Association, wishes to reiterate that this is no mere isolated or exceptional case, but that it serves as a representative example of the inequity constantly present as a result of the Board's enforcement of the Act's penalties while denying its privileges.

II.

The Enforcement of the Unfair Labor Practice Provisions of the Act Against Employers and Unions in the Construction Industry Defeats Rather Than Effectuates the Purposes of the Act. The Order of the Board in This Case Having Been Issued Under a One-sided Administration of the Act It Is in Excess of the Board's Delegated Authority and Should Be Set Aside.

The well considered contentions of the petitioners persuasively set forth various compelling reasons why this Court should grant a writ of certiorari to review the decree of the United States Court of Appeals. *Amicus curiae* will not undertake herein to reiterate or amplify such reasons. It is the purpose of this brief to demonstrate that the instant type of litigation is encountered repeatedly by employers in the building and construction industry and to urge this Court to rectify this aggravated situation wherein a one-sided administration of the law results in the frustration of the basic objectives of that law and in the denial of due process in contravention of the Fifth Amendment to the United States Constitution.

The court below and the National Labor Relations Board defend the imposition of penalties by the contention that the facts indicate the Petitioner would have been guilty of transgressing Section 8(a)(3) even if a representation election had been held. This, however, is assuming a set of circumstances which has seldom been permitted to arise under the admitted inability of the

NLRB General Counsel to conduct elections for the employees of general contractors as distinguished from specialty contractors. An illustration will serve to demonstrate that availability of the representation procedure might well have resulted in a situation which would have deterred if not precluded the charging parties in this proceeding from having been able to assert a claim of discrimination under the Act.

Had the election procedure in the Act been available in the building and construction industry, as it has been in manufacturing, it is entirely likely that the AFL Building & Construction Trades Department Unions (including the carpenters organization) would have been the certified bargaining agent of petitioners' employees. The domination of those groups in the construction field is well known. (See Covington, "Jurisdiction of the National Labor Relations Board Over the Building and Construction Industry," 2 No. Car. Law Rev. 1, 2.) Furthermore, the local chapter of the Associated General Contractors of America, as the contractors group and the employers' bargaining representative would have been considered as the appropriate unit and *as one employer*. (This was the manner in which the Board handled these issues in the Olean & Baltimore representation cases,[1] two of the few building industry cases wherein the Board found it possible to conduct elections.) The next logical consequence which would have followed would have been an election under the provisions of the then applicable Section 9(e) in which the traditionally union-security-

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[1] *Plumbing and Heating Contractors Ass'n*, 93 NLRB 1081; *Plumbing Contractors Ass'n of Baltimore*, 93 NLRB 1099.

minded craftsmen would have undoubtedly authorized the negotiation of the 30-day union shop clause found in the collective bargaining agreement [R. 139-140; U. S. Bureau of Labor Statistics, Bulletin No. 909, June 24, 1947, pp. 2, 7]. While the mere execution of such a clause might not have precluded the applicants herein from approaching petitioners for employment, it is highly possible that they would have achieved 30 days service with AGC members prior to application, in which event they would have either achieved membership status or could have been lawfully rejected for further employment by any company in the multiple-employer unit.

All of the foregoing, which is clearly within the realm of probability and logical likelihood if the full privileges of the law had been extended to petitioners, was denied these companies. Instead, they are being exposed to penalties and the continuing possibility of similar strife-provoking jurisdictional raids predicated upon this administrative loophole which has rendered one of the basic precepts of the Act unavailable to employers in this industry.

Accordingly, it does not suffice for the National Labor Relations Board and the Court of Appeals to assert that legislative relief should be sought to correct this glaring inequity. Judicial relief is clearly available and should be extended in the premises. This Honorable Court should not condone these repeated instances of the processing of unfair labor practice charges which, had the representation procedure set forth in the Act been made available to all, might in all probability have never been filed.

Conclusion.

For the reasons set forth above and by petitioner it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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MESERVE, MUMPER & HUGHES,
LEWIS T. GARDINER,
Of Counsel.

Appendix "A."

Members of the National Constructors Association

Bechtel Corporation.

C. F. Braun & Company.

Chemical Construction Corporation.

Day & Zimmerman, Inc.

The H. K. Ferguson Company, Inc.

The Fluor Corporation, Ltd.

Ford, Bacon & Davis Construction Corporation.

Foster Wheeler Corporation.

The Girdler Corporation.

Graver Construction Company.

Hydocarbon Research Corporation.

The M. W. Kellogg Company.

Koppers Company, Inc.—Engineering & Construction Division.

The Lummus Company.

Arthur G. McKee & Company.

J. F. Pritchard & Company.

Procon Incorporated.

The Rust Engineering Company.

Stone & Webster Engineering Corporation—Badger Process Division.

Associate Members

The Babcock & Wilcox Company.

Universal Oil Products Company.

Appendix "B."

RECENT N.L.R.B. PROCEEDINGS INVOLVING ASSOCIATION MEMBERS IN MACHINIST-MILLWRIGHT CONTROVERSIES OVER WORK JURISDICTION.

The Fluor Corporation, Ltd., NLRB 39-CA-95.

Graver Tank and Manufacturing Co., Inc., NLRB 39-CA-225.

The Kellogg Company, NLRB 39-CA-207.

The Kellogg Company, 94 NLRB 526.

The Lummus Company, NLRB 39-CA-205.

The Lummus Company, NLRB 39-CA-215.

Arthur G. McKee & Company, NLRB 39-CA-80, 196 Fed. 2d 636.

Stone & Webster Engineering Corporation, NLRB 39-CA-206.

CERTIORARI DENIED